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IN THE

Supreme Court of the United States

October Term, 196~~4~~5
No. ~~[illegible]~~ 157

MICHELE MARCHESE,
Petitioner,
vs.
UNITED STATES OF AMERICA, PRESTON SMITH, Warden of United States Correctional Institution at Terminal Island, California,
Respondents.

JESSE DEL BONO,
Petitioner,
vs.
UNITED STATES OF AMERICA, R. W. MAY, Warden of United States Correctional Institution at Terminal Island, California,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Judgment Reversing Judgment of the United States District Court for the Southern District of California.

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Errata.

p. i, paragraph 3, second line should read "Del Bono, *the United States* attorney."

p. 2, footnote 4 on p. 29 should be part of footnote 3.

p. 17, second line of heading should read "Bono, *The United States* Attorney."

p. 17, last line of first paragraph, should be (*Appendix D*).

p. 29, last line of first paragraph, remove footnote reference 4.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Judgment Reversing Judgment of the United States District Court for the Southern District of California.

This is a joint petition of Michele Marchese and Jesse Del Bono for writ of certiorari to review the judgments and orders made by the Ninth Circuit Court of Appeals, reversing the judgment in favor of Michele Marchese and the judgment in favor of Jesse Del Bono made and entered by the United States District Court for the Southern District of California on September 30, 1963, and December 30, 1963, respectively. The two cases were consolidated on appeal of the Respondents by the Ninth Circuit Court of Appeals, and a single judgment and opinion were rendered by said Court; hence a single joint petition is filed in this Honorable Court to review the judgment of the Circuit Court.

The Finding of Fact in the Marchese case were set forth verbatim in the opinion of the Circuit Court except Paragraph XII thereof.[1] The Conclusions of Law were also set forth verbatim except Paragraph I thereof.[2] The Findings of Fact and Conclusions of Law in the Del Bono case were identical with Marchese except as to coinciding numbered paragraphs.[3] A copy of the judgment in the Marchese case is attached, Appendix "A", and a copy of the judgment in the Del Bono case is attached, Appendix "B."

A copy of the judgment of reversal and of the opinion of the Ninth Circuit Court of Appeals, which are as yet unreported, are attached, Appendices "C" and "D" respectively. A Petition for Rehearing (Appendix "E") was filed and was denied on March 3, 1965, a copy of said order of denial being attached, Appendix "F".

---

[1] MARCHESE, FINDING XII:

That Michele Marchese has served approximately four years and four months of his sentence; that his prison record is very good and he has earned enough good time under the rules of the Bureau of Prisons as to entitle him to be released if his sentence should be cut to five years.

[2] MARCHESE, CONCLUSION I:

That since the petitioner Michele Marchese was tried by this Court and was within the territorial jurisdiction of this Court when the Petition for the Writ of Habeas Corpus was filed, the Court can treat the petition interchangeably as a petition for a Writ of Habeas Corpus and as a motion under Section 2255 of Title 28, U.S.C., and that this Court has jurisdiction to determine this matter and grant such relief as appears appropriate.

[3] DEL BONO FINDING XI:

That Jesse Del Bono has served in excess of four years and eight months of his sentence; that his prison record is good and he has earned enough good time under the rules of the Bureau of Prisons and under the United States Code as to entitle him to be released if his sentence is cut to five years.

Jurisdiction.

The District Court had jurisdiction in this case under Title 18, Section 371 U.S.C.; Title 21, Section 174 U.S.C.; and Title 28, Sections 2241(a), 2243, and 2255 U.S.C.

The Circuit Court had jurisdiction under Title 28, Sections 1291, 1294, 2253, and 2255.

This Court has jurisdiction under Title 28, Section 1254(1) to review the judgment in question.

History of Marchese Case.

Marchese was convicted of ten counts of an indictment charging conspiracy and violation of the narcotics laws of the United States involving three sales and his co-defendant Jesse Del Bono was convicted of four counts, in the United States District Court, Southern District of California, Central Division, on June 16, 1958.

On April 15, 1958, the Ninth Circuit Court of Appeals affirmed the judgment of conviction without opinion or decision (264 F. 2d 892); and on June 29, 1959, the petition for certiorari was denied by the United States Supreme Court, also without opinion (360 U.S. 930).

A motion was made under *Section 2255 of Title 28 U.S.C.* in said District Court to annul, vacate and set aside the judgment of conviction in case of ***Marchese v.***

United States of America, No. 1300-60-T.C.; and the same was denied on December 22, 1960, and a petition for rehearing and reconsideration of an amended and renewal motion was denied by said Court on March 15, 1960. The time for appeal was permitted to lapse. No findings of fact or conclusions of law were filed.

A petition for writ of habeas corpus was filed by petitioner in said District Court on June 20, 1961, in the instant case and on the 29th day of June, 1961, the said petition was dismissed *ex parte*, without a hearing, by a District Court Judge different from the one who had tried the case and who had heard the previous motion. The judgment of dismissal was affirmed by the Ninth Circuit Court of Appeals on May 31, 1962 (304 F. 2d 154), and a petition for rehearing was denied on July 12, 1962.

At no stage of the preceedings in this case or in the case in which petitioner was convicted had there ever been a decision or opinion on the merits on any of the grounds urged. In the instant case the opinion of the Circuit Court only covered the question as to the jurisdiction of the District Court and did not pass upon the merits of questions involved as to the violation of petitioner's constitutional rights.

Thereafter within the time allowed, Marchese filed with the Supreme Court, a petition for certiorari. The Government filed an opposition thereto, and a reply to such opposition was filed by petitioner. On June 10, 1963, this Honorable Court granted the petition for certiorari and rendered its decision as follows:

> *"Per Curiam.*
>
> The petition for writ of certiorari is granted, the judgment vacated and the case remanded to the

United States District Court for the Southern District of California for reconsideration in the light of *Sanders v. United States,* 373 U.S. 1." (*Marchese v. United States,* 374 U.S. 101.)

Pursuant to order of this Court a hearing took place on the matter before the Honorable Thurmond Clarke, United States District Judge in the Southern District of California, the judge who had tried the case and previously sentenced petitioner, and on September 30, 1963, judgment was rendered and entered in favor of Marchese, granting the petition, and discharging him. The Government filed its notice of appeal on November 27, 1963, and its designation of record on February 24, 1964.

Since the appellants had not filed and docketed the record on appeal within 90 days, without obtaining an extension of time from the Circuit Court as provided under Title 28, Rule 73, Federal Rules of Civil Procedure, Marchese made a motion in the Circuit Court on March 16, 1964, to dismiss the appeal for such default, but said motion was denied.

The appellants filed and docketed the record on appeal on March 13, 1964, but did not file copies of the record within 30 days thereafter as required by *Rule 10 of the Rules on Appeal for the Ninth Circuit.* So another motion was made to dismiss the appeal, but this motion was also denied July 10, 1964.

On February 10, 1965, the Circuit Court reversed the judgment of the District Court (Appendix D) and a joint petition for rehearing was filed by Marchese and Del Bono on February 25th (Appendix E) but said petition was denied on March 3, 1965 (Appendix "F").

History of Del Bono Case.

The history of the Del Bono case is the same as that of Marchese up to and including the denial of certiorari on June 29, 1959.

A motion was made by Del Bono on November 16, 1960, under *Title 28, Section 2255 U.S.C.* in the United States District Court, Southern District of California, and it was denied on December 22, 1960, and a motion for reconsideration was denied on March 16, 1961. No findings of fact or conclusions of law were filed. No appeal was taken, since Del Bono was then incarcerated and had no funds for appeal. The same was true with respect to a second motion under *Section 2255* filed under date of December 19, 1961, which motion was also denied.

After the order of this Court granting certiorari in the Marchese case, Del Bono being incarcerated in the Southern District of California, filed a new motion under *Section 2255* and in the alternative a petition for habeas corpus under *Title 28, Section 2243*. Hearing was had and on December 20, 1963, his motion and petition were granted and judgment rendered in his favor (Appendix B). From this judgment the Government appealed, and on appeal his case was consolidated with Marchese's case, and a single judgment and opinion were made by the Circuit Court in both cases (Appendices C and D). A Petition for Rehearing (Appendix E) was denied on March 3, 1965 (Appendix F).

Questions Presented.

1. Whether the decision of the Circuit Court of Appeals is in conflict with the decision of the Supreme Court granting the Petition for Certiorari heretofore filed by petitioner, Marchese, *Marchese v. United States*, 374 U.S. 104; and also is in conflict with the decision in *Sanders v. United States*, 373 U.S. 1.

2. Whether the Trial Court was justified in finding from the evidence that petitioner Marchese was denied a fair trial and due process of law because one Donald Sussman, a special employee of the Government conspired and agreed with federal and state employees to ensnare petitioner and he and Federal Agent Malcolm Richards committed perjury as witnesses.

3. Whether during the trial of Marchese and Del Bono, the United States Attorney abused the privilege of his office by actively participating in the suppression of the truth and failing to disclose the truth concerning the obvious agreement or understanding between Donald Sussman and Federal and State authorities, contrary to his oath of office and in disregard of petitioners' constitutional rights under the Fifth Amendment.

4. Whether the use of evidence obtained by the means of an electric transmitting device known as the Schmidt Transmitter was unlawful and violative of the Fourth and Fifth Amendments of the Constitution.

5. Whether the arrest of petitioner Marchese without a warrant, the search of his person and apartment and of the Del Bono automobile without a search warrant all violated the Fourth Amendment.

6. Whether evidence obtained by the interception of a telephone conversation violated the Federal Communi-

cations Act, Title 28, Section 605 U.S.C. as well as the Fifth Amendment (The specific question as to violation of the Fifth Amendment was not raised below but now seems applicable in the light of *Massiah v. United States*, 374 U.S. 805).

7. Whether the Circuit Court transgressed the scope of appellate review in refusing to accept the findings and conclusions of the District Court based on substantial evidence, both direct and inferential, and erroneously substituted its independent judgment in connection therewith, and thereby so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

8. What is the scope of the jurisdiction and power of a District Court in granting relief under Sections 2243 and 2255 of Title 28, U.S.C.?

(a) Is the relief to be granted "exactly commensurate" under either section?

(b) May a District Court modify a sentence and discharge the petitioner for time served and thereby "dispose of the matter as law and justice require", either under Section 2243 or Section 2255?

(c) Can a District Court grant partial relief under Section 2243 and partial relief under Section 2255 if both matters are heard at the same time and the relief granted is incorporated in one judgment?

9. Whether a District Court judge in his discretion may review matters in either Section 2243 or Section 2255, which matters, though previously presented on appeal, were not passed upon directly or indirectly by the Circuit Court, in accordance with the ruling in *Sanders v. United States*, 373 U.S. 1.

Statutes Involved.

The relevant constitutional and statutory provisions are printed in Appendix "G", *infra.* They are: Title 28, Sections 2241(a), 2243, 2244 and 2255, U.S.C.; Title 18, Rule 35 U.S.C., Rules of Criminal Procedure; Title 18, Sections 4161 and 4163; Title 21, Section 174 U.S.C.; Title 26, Sections 4704(a) and 7237; Fourth and Fifth and Sixth Amendments of the United States Constitution; and Title 47, Section 605 U.S.C. (Federal Communications Act.)

Statement of Facts.

We shall briefly summarize the facts as they are set forth in some detail in the petition of Marchese for habeas corpus [Marchese, Clk. Tr.], and in Del Bono's petition and motion [Del Bono, Clk. Tr. pp. 4-9]. Furthermore pertinent facts are set forth in the findings of the District Court quoted by the Circuit Court in its opinion. (Appendix D). A memorandum was filed with the District Court pointing out portions of the record wherein the specific findings were supported [Marchese, Clk. Tr. pp. 139-142].

Sussman, a dope peddler and addict, convicted for possession and sale of narcotics under the laws of California, was arrested on January 29, 1958, for violation of Section 174, Title 26, U.S.C. for sale of narcotics.

He was induced by narcotics agents to ensnare and secure the conviction of Marchese. During the six weeks of investigation prior to the latter's arrest, Sussman was employed by the Federal Narcotics Bureau as a special employee being paid $600.00. They also acquiesced in his obtaining and using heroin to satisfy a habit costing $75.00 a day and requiring shots every 4 or 5 hours so he was continuously under the influence of narcotics and this was known to the agents [Trial, Rep. Tr. pp. 411, 421, 422, 428, 429]. On three occasions he was equipped with an electronic transmitting device known as the Schmidt Transmitter, concealed on his person, and using friendship as a means of entry he entered Marchese's apartment.

Agent Richards and a deputy sheriff of Los Angeles County listened in on these conversations through a receiver about a block or two away and were permitted over objection to testify as to the conversations overheard. During the investigation Richards caused Sussman to telephone Marchese at the latter's home and apartment and listened in on the conversations. Richards over objection was permitted to testify as to the conversations.

On the day of Marchese's arrest, Mrach 13, 1958, even though he and his co-defendant Del Bono had been under close surveillance for six weeks, the agents entered Marchese's apartment with drawn guns, searched his person and apartment and arrested him without a search warrant or warrant of arrest. They had about an hour earlier, without a search warrant, searched Del Bono's automobile at the Charles Restaurant over a mile from Marchese's apartment and found a quantity of heroin.

At the trial Sussman testified he was using the information against the defendants solely for the purpose of *getting a lighter sentence* and that on the night of his arrest (when he met with Narcotics officers in their office) he knew that if he could give Government agents some information about somebody he would "probably" get a lighter sentence [Marchese, Find. IV quoted by the Circuit Court (App. D)].

Agent Richards testified that nothing was ever said in his presence that if Sussman cooperated he would receive a lighter sentence in the criminal matter then pending against him [Marchese, Find. VI quoted by the Court].

At the time of the trial, without the knowledge of attorneys for petitioners, Sussman had already received the benefit of his cooperation. The indictment against him under Section 174 of Title 21 had been dismissed by U.S. Attorney Bevan, and an information filed against him, wherein he was charged only with a violation of Sections 4704 and 7237 of Title 26 U.S.C., to which he pleaded guilty and was shown the greatest leniency, in that he was sentenced to the minimum of two years with a recommendation he be sent to the Fort Worth Prison Hospital. Through the further activities of Richards in meeting with the California probation officer, Sussman's 5 year probation was revoked and terminated, and he was sentenced to one year to run concurrently with the Federal sentence, so that his sentence would end prior to the completion of the federal sentence.

Assistant U.S. Attorney Bevan, aware of all these facts stood by while the false testimony was given, but by technical objection suppressed the evidence sought by defense counsel relating to promises or agreements of leniency for Sussman's cooperation.

At the hearing in the District Court following the granting of certiorari and reversal by this Court, both

Agent Malcolm Richards and former U.S. Attorney Bruce Bevan testified, and the substance of their testimony summarized by petitioners is set forth in Note 4 of the opinion of the Circuit Court. Some of the facts will be adverted to in our argument.

Reasons for Granting the Writ.

1. A conflict exists between the decision of the Ninth Circuit Court of Appeals and the decision of this Court in *Sanders v. U. S.*, 373 U.S. 1, in that the said Circuit Court has narrowed, if not vitiated the scope of review and discretion of the District Court under Sections 2243 and 2255, and this Court must resolve said conflict for the guidance of the lower courts in future cases.

2. A conflict exists between the decision of the Ninth Circuit Court of Appeals in this case relative to the jurisdiction of the District Court to grant the relief determined by it, and the decisions of Courts of Appeals in other Circuits, among which are *Kinsella v. Looney*, 217 F. 2d 445 (10th Cir.); *McKenna v. Ellis*, 280 F. 2d 593 (5th Cir.); *Powell v. Wiman*, 287 F. 2d 275 (5th Cir.), and such conflict must be resolved by this Court.

3. A conflict exists between the decision of the Circuit Court of Appeals and the case of *Lopez v. U.S.*, 373 U.S. 427 in which this Court by dicta indicated that the case of *On Lee v. U.S.*, 343 U.S. 747, was no longer authority, but has not specifically passed upon

the question as to the right to use evidence obtained by the use of a hidden electronic transmitter, and this important question should be settled by this Court.

4. A conflict exists between the Courts of Appeals of the various circuits relating to the scope and authority of appellate review where some evidence exists to support a finding of fact of the trial court. In the instant case the Circuit Court has so far departed from accepted and usual modes not only of other circuits, but also from its own decisions in order to reach a decision adverse to petitioners, as to call for an exercise of this Court's power of supervision.

5. This Court should exercise its jurisdiction to overrule cases cited and relied on by the Circuit Court which are contrary to *Sanders v. U.S., supra,* such as *Dodd v. United States,* 321 F. 2d 240 (9th Cir.); *Black v. United States,* 269 F. 2d 38 (9th Cir.).

ARGUMENT.

1. Whether the Decision of the Circuit Court of Appeals Is in Conflict With the Decision of the Supreme Court Granting the Petition for Certiorari Heretofore Filed by Petitioner, Marchese, Marchese v. U.S., 373 U.S. 101, and Also Is in Conflict With the Decision in Sanders v. U.S., 373 U.S. 1.

In its present opinion, the Circuit Court states:

> "Section 2255 cannot take the place of an original appeal. More properly stated, Sec. 2255 may not be invoked to relitigate questions which were or should have been raised on a direct appeal from the judgment of conviction. *Dodd v. United States,* 321 F(2) 240 (9th Cir. 1963); *Black v. United States,* 269 F(2) 28 (9th Cir. 1959)."

In the previous decision, affirming the judgment of dismissal of Marchese's petition for habeas corpus (304 F. 2d 154), the Circuit Court held in effect that:

(a) Petitioner having failed to appeal from the denial of his motion under 2255 may not now question the ruling on that motion or the validity of his sentence by use of habeas corpus.

(b) Petitioner fares no better if his application is treated as a motion under 2255, since the grounds raised were based on decisions subsequent to the original motions under 2255 and such decisions could not be the basis for a second motion.

The said Circuit Court decision was reversed by this Court, yet in the present opinion, the Circuit Court persists in the same views and rulings, disregarding the reversal and overruling by this Court thereof. It admitted that there had been no previous opinion as to what was or was not raised on appeal.

We submit that the decision of this Court was conclusive in the instant case and justified the District Court, after hearing and reconsidering the matter, in granting the motions and petitions of Marchese and Del Bono discharging them under the rules laid down in *Sanders v. U.S. supra.* (The *Sanders* case was also a case where this Court reversed the Ninth Circuit.) The Circuit Court, however, in its efforts to support its reversal of the District Court judgment minimizes, narrows and vitiates the *Sanders* decision and is in conflict therewith. The Court continued to treat a denial of a former motion under 2255 in effect as *res judicata,* disregarding the wording of *Sanders,* wherein the Supreme Court stated:

> "A prisoner barred by res judicata would seem as a consequence to have an 'inadequate or ineffective' remedy under Sec. 2255 and thus be entitled to proceed in federal habeas corpus—where, of course, Sec. 2255 applies."

This Court also stated that controlling weight may be given to prior denial only if (2) there was an adjudication on the merits; and

> "(3) Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting a redetermination of the ground."

In the instant case there was no previous hearing and adjudication on the merits, nor was there ever an opinion on the merits from any court even on the first appeal. Moreover, the District Court in the last hearing did in fact determine that the "ends of justice would be served" by hearing evidence and then granting the petitions and motions of Marchese and Del Bono, upon remand by this Court.

Finally the Circuit Court overlooked the exception this Court has made to the rule that *habeas corpus* cannot take the place of appeal, namely that such rule is not applicable where constitutional rights have been violated. (*Sunal v. Large*, 332 U.S. 174; *Hill v. U.S.*, 368 U.S. 424). (See Reasons for Granting the Writ, No. I, *supra.*)

2. Whether Petitioner Marchese Was Denied a Fair Trial and Due Process of Law Because One Donald Sussman, a Special Employee of the Government Conspired and Agreed With Federal and State Employees to Ensnare Petitioner and He and Federal Agent Malcolm Richards Committed Perjury as Witnesses.

As pointed out *supra* and in the petition for habeas corpus, both government employees committed perjury with respect to any promises or agreements as to leniency for Sussman if he cooperated with federal agents. The evidence of such agreement was, of necessity, circumstantial and inferential, but the District Court made detailed findings thereof (Appendix D). This point has been discussed in the petition (pages 16-24). See [Marchese, Clk. Tr.] and in the next point *infra*. Under the case of *Napue v. Illinois*, 360 U.S. 264, it is clear that petitioner's constitutional rights were violated.

3. Whether During the Trial, of Marchese and Del Bono Attorney Abused the Privilege of His Office by Actively Participating in the Suppression of the Truth and Failing to Disclose the Truth Concerning the Obvious Agreement or Understanding Between Donald Sussman and Federal and State Authorities, Contrary to His Oath of Office and in Disregard of Petitioners' Constitutional Rights Under the Fifth Amendment.

We have heretofore, and in the respective petitions [Marchese Petition, Clk. Tr. p. 21 *et seq.*; Del Bono, Clk. Tr. p. 10 *et seq.*] pointed out the evidence in support of this charge. The evidence introduced at the last hearing as summarized by petitioner-appellees in their reply brief is set forth in Footnote Four of the Circuit Court's opinion (Appendix F).

Under the rule of *Napue v. Illinois, supra,* there was a clear violation of petitioners' rights of a fair trial and due process. The evidence in support of the trial court's finding was based partly on direct and partly on circumstantial evidence, together with inferences reasonably drawn therefrom. As must be the case, proof of the charges of the knowing use by the prosecution of perjured evidence, must depend on circumstantial evidence and inferences, since both the prosecution and the government agents will generally deny such charges, and the prisoner, beneficiary of promised leniency, will deny any promises made, for fear of reprisal and termination of assistance for leniency.

In the *Napue* case for example the promise of the former prosecuting attorney only came to light some time later when the said attorney, then in private practice, filed on behalf of the state's witness, Hamer, a petition for *coram nobis*, in which he stated that the prosecutor had promised the said witness that a recommendation for a reduction of his sentence would be made, and, if possible, effectuated. At the hearing on Napue, the said attorney attempted in his testimony to modify and weaken his statements in the Hamer petition. The Supreme Court of Illinois on the basis of the attorney's testimony, affirmed the denial of Napue's petition, but this Court in a strongly worded decision reversed the judgment below.

In the instant case, despite the denials of Sussman and Agent Richards, there were facts and circumstances from which the Court could and did infer that there was in fact an agreement and promise of leniency to Sussman for his cooperation, and that the U.S. Attorney knew of such and participated in carrying out the agreement as indicated by the following:

(a) Richards conferred with the federal probation officer and also with the California state probation officer to help Sussman after the arrest of petitioners. He also discussed the matter with the U.S. Attorney Bevan who was prosecuting the case. In each instance he advised of Sussman's "cooperation", impliedly seeking consideration for Sussman.

(b) As a consequence of Richards' activities, Sussman greatly benefited in that (1) the serious charge of violation of Sec. 174 of Title 21 U.S.C. with a minimum sentence of 5 years was dismissed by Bevan and an information filed against him under Sec. 4704(a) and 7239 of

Title 26, U.S.C. (a tax statute with a minimum sentence of two years. To this information Sussman pleaded guilty and was sentenced by the District Court Judge Byrne to two years, with a recommendation that Sussman be sent to Fort Worth Prison hospital.

(c) Then as a further consequence of Richards' activities the five year probation of Sussman in the state narcotics sentence was revoked and terminated, and he was given a sentence of one year to run concurrently with the federal sentence, so that his prison term would be ended prior to the completion of the federal sentence.

It is common knowledge of judges, prosecuting and defense attorneys; that every day "deals" are made by government agents and attorneys with certain defendants for leniency, in consideration of the latters' cooperation as "special employees" or prosecution witnesses against other defendants; that recommendations by agents to government attorneys for leniency are followed by such attorneys in recommendations of leniency to the courts, and that the courts generally give great weight to or follow such recommendations. This is not generally known by jurors and evidence of some "deal" would have considerable effect with the jury. The District Court judge could justly infer from the circumstantial evidence that some such "deal", agreement or promise was made in the instant case. He could disregard any denial on the part of Agent Richards and Sussman and treat such testimony as perjurious, and reasonably find from the circumstantial evidence of the case that perjury was in fact committed by Sussman and Richards and was knowingly permitted by the U.S. Attorney.

The following language of the court in *People v. Nitzberg,* 289 N.Y. 523, reversing a conviction is pertinent:

> "The three witnesses who furnished corroborative evidence were confirmed criminals, and though it is abundantly proved by this record that the District Attorney made no promise that they would receive any benefit in consideration of their testimony, it is abundantly proven that they did in fact obtain such benefits in recognition of their help."

In the instant case, Sussman had a criminal narcotics record, with three prior felony convictions and his record was admittedly known to the U.S. Attorney. At the time of trial of petitioners, Sussman had already been highly rewarded for his cooperation as above set forth, and this was also known to the U.S. Attorney, yet no disclosure was made by the U.S. Attorney thereof, and by technical objection on his part, the information was prevented from being brought out. This objection and failure to disclose was contrary to his obligations as delineated by this Court in the case of *Berger v. U.S.,* 295 U.S. 78 at page 88.

4. Whether the Use of Evidence Obtained by the Means of an Electric Transmitting Device Known as the Schmidt Transmitter Was Unlawful and Violative of the Fourth and Fifth Amendments of the Constitution.

There is no dispute in this case that the Schmidt Transmitter was concealed on Sussman's person by federal agents and that he gained access to Marchese's apartment so outfitted on three occasions through his friendship with Marchese and that the conversations were overheard by a receiving set and listened to by

Agent Richards and deputy Sheriff Farrington in an automobile a block or two distant from the apartment. They were permitted over objection to testify as to such conversations.

The District Court having before it the citations of *Silverman v. U.S.*, 365 U.S. 505, and *Lopez v. U.S.*, 373 U.S. 427, and the *Marchese* decision of this Court, *supra,* rightly treated the above as a violation of petitioners' constitutional rights under the Fourth and Fifth Amendments and made findings of fact and conclusions of law to that effect.

The Circuit Court, however, ignored this phase of the case, apparently considering this particular question as not capable of being raised since it was not raised on appeal from the judgment of conviction. The Circuit Court ignored the change in this Court's viewpoint since the original appeal, at which time the case of *On Lee v. U.S.*, 344 U.S. 747 was authority for the rule that evidence obtained by the use of a transmitting device was admissible.

Both the *Silverman* and the *Lopez* cases indicate that *On Lee* is no longer authority. In *Silverman* this Court quoted with approval in Note 4 of its opinion, a statement from Judge Frank, in his dissent in the court below in *On Lee,* 193 F. 2d 306, 315. In *Lopez,* Mr. Justice Warren in his concurring majority opinion stated:

> "Since I agree with Mr. Justice Brennan that the *On Lee* case was wrongly decided and should not be revitalized, but base my views on grounds different from those stated in the dissent, I have chosen to concur specially. I also share the opinion

> of Mr. Justice Brennan that the fantastic advances in the field of electronic communications constitute a grave danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments."

Mr. Justice Harlan in his dissenting opinion joined by Mr. Justice Douglas and Mr. Justice Goldberg, stated with respect to *On Lee* as follows:

> "I believe that that decision was error, in reason and authority, at the time it was decided; that subsequent experience has sapped whatever vitality it may once have had; that it should now be regarded as overruled; that the instant case is rationally indistinguishable; and that, therefore, we should reverse the judgment below.
>
> "The United States, in its brief and oral argument before this Court in the instant case, made little effort to justify the result in *On Lee,* doubtless because it realizes that that decision has lost virtually all of its force as authority. Instead, the government seeks to distinguish the instant case. This strategy has succeeded, it appears, with a majority of my brethren. The Court's refusal to accord more than a passing mention in its opinion to the only decision of this Court — *On Lee* — factually analogous to the case at bar suggests very strongly that some of my colleagues who have joined the Court's opinion today agree with us that *On Lee* should be considered a dead letter."

The Circuit Court's decision in disregarding this phase of the violation of petitioner's constitutional rights is in conflict with the *Silverman* and *Lopez* decisions. This conflict should be resolved and the question settled, since it is an important question of law which affects the use of such devices by law enforcement officers. Moreover, the settlement of such question is important for the guidance of lower courts as well as to resolve the conflicts now existing. (See Reasons for Granting the Writ, No. 3, *supra*).

5. Whether the Arrest of Petitioner Marchese Without a Warrant, the Search of His Person and Apartment and of the Del Bono Automobile Without a Search Warrant, All Violated the Fourth Amendment.

Although the federal officers had the petitioners under surveillance for over six weeks, on March 13, 1958, they entered Marchese's apartment with drawn guns, searched his person and apartment finding no narcotics and arrested him without a search warrant or warrant of arrest. They also searched the automobile of Del Bono parked about a mile away without a search warrant and found a quantity of heroin. At no time did the agents ever find any narcotics in Marchese's possession or apartment, nor did they ever find any marked money allegedly given to Marchese by special employee Sussman.

The failure to obtain the necessary warrants by the agents, with ample time and opportunity to do so, was violative of the Fourth Amendment and contrary to the rules laid down in:

Chapman v. U.S., 5 L. Ed. 2d 828;
Johnson v. U.S., 333 U.S. 10;
Taylor v. U.S., 286 U.S. 1.

6. Whether Evidence Obtained by the Interception of a Telephone Conversation Violated the Federal Communications Act, Title 28, Section 605 U.S.C. as Well as the Fifth and Sixth Amendments. (The Specific Question as to Violation of the Fifth and Sixth Amendment Was Not Raised Below but Now Seems Applicable in the Light of Massiah v. U.S., supra.)

In raising this question we are not unmindful of the decision of *Rathbun v. U.S.*, 335 U.S. 107. We feel, however, that the language of this Court in *Rathbun* is too sweeping and that said decision should be reexamined and reconsidered in the light of later cases, and especially in the light of *Massiah v. U.S.* In *Rathbun* this Court stated that if either of two parties consents to the listening in, there is no violation of the Communications Act, since the communication is not privileged and one party may not force the other to secrecy merely by using the telephone.

That case is distinguishable from the instant case in that in *Rathbun* the one permitting the listening in or interception was not the sender but the receiver of the call; whereas, in the instant case, the call was initiated by the consenting party and was made into the apartment of Marchese, the receiver. This invaded the rights of privacy of the one to whom the call was made. In accepting the call within the confines of his apartment, he did not force secrecy upon the other party, but only prevented anyone listening in from testifying to the conversation.

Suppose the conversation had taken place between attorney and client, husband and wife, or doctor and patient. Under the language of *Rathbun,* there might be said to be a waiver of the protection as to confidential communications, in such instances.

Further, in cases heretofore decided by some Circuit Courts and in a case now pending before Ninth Circuit, the interceptions were accomplished by induction coils in the telephone, by Twinfone or by Minifon recorders attached to or touching the telephone, rather than by extensions. The question is whether such attachments violates the Communications Act.

In the instant case the conversations overheard and testified to by Agent Richards took place after the investigatory process had shifted to accusatory — when its focus was on the accused. *Escobedo v. Illinois,* 375 U.S. 902. In the case of *Massiah v. U.S., supra,* a conversation between the defendant Massiah and special employee Colsom, was overheard by Agent Murphy through the use of a transmitter concealed in Colsom's car with the latter's consent, and the admission of such testimony of Agent Murphy concerning the same was held a violation of Massiah's constitutional rights under the Fifth and Sixth Amendments.

The same rule applies here, so Marchese's rights under said Amendments were violated.

7. Whether the Circuit Court Transgressed the Scope of Appellate Review in Refusing to Accept the Findings and Conclusions of the District Court Based on Substantial Evidence, Both Direct and Inferential, and Erroneously Substituted Its Independent Judgment in Connection Therewith, and Thereby so Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for the Exercise of This Court's Power of Supervision.

This question has been presented in some detail in the Petition for Rehearing, a copy of which is attached hereto, as Appendix "E". We have also pointed out, *supra,* findings of the District Court were supported by the evidence. (*Questions* 2 and 3). Rule 52(a) of Title 28, U.S.C. Federal Rules of Civil Procedure provides in part:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

In the instant case there was evidence that Sussman and Agent Richards committed perjury with respect to promises or agreements of leniency for Sussman's cooperation. The findings would have been "clearly erroneous" only if there was no evidence to support the findings. Moreover, District Judge Thurmond Clarke not only tried the case originally but also conducted the hearings in which he granted the motions and petitions. He thus had the opportunity to judge the credibility of Sussman, Agent Richards and former Assistant U.S. Attorney Bevan, and his determination of their credibility was binding on the Circuit Court.

The Circuit Court, in arrogating to itself the right to pass on such credibility in the resolving of any conflicts in which it might disagree with the District Court, and the drawing of inferences from the evidence different from those drawn by the District Court, clearly transgressed the scope of appellate review in well established and long standing rules. Some of these rules are set forth, supported by citations in the Petition for Rehearing (Appendix "G") under Point No. 6, so we will not reiterate them at this point. (See Reasons for Granting the Writ, No. 4).

8. What Is the Scope of the Jurisdiction and Power of a District Court in Granting Relief Under Sections 2243 and 2255 of Title 28, U.S.C.?

(a) Is the Relief to Be Granted "Exactly Commensurate" Under Either Section?

(b) May a District Court Modify a Sentence and Discharge the Petitioner for Time Served and Thereby "Dispose of the Matter as Law and Justice Require", Either Under Section 2243 or Section 2255?

(c) Can a District Court Grant Partial Relief Under Section 2243 and Partial Relief Under Section 2255 if Both Matters Are Heard at the Same Time and the Relief Granted Is Incorporated in One Judgment?

One of the principal questions and perhaps the most important one is whether the District Court exceeded its authority in granting the relief accorded to petitioners, as ruled by the Circuit Court.

We call this Court's attention to the attacks of the Ninth Circuit on *habeas corpus* and Section 2255. In

United States v. Hayman, 187 F. 2d 456, the Circuit Court held that Section 2255 was unconstitutional and treated it as a nullity and dismissed defendants motion. The decision was reversed by this Court (342 U.S. 205) which held that:

> "the sole purpose was to minimize the difficulties encountered in habeas corpus by affording the same rights in another and more convenient forum."

In the case of *Sanders v. U.S.,* 297 F. 2d 735 (9th Cir.), Sanders did not appeal. Later he filed a motion under Section 2255 and this was denied by the District Court without a hearing. He filed a second motion on grounds not set forth at the time of trial. This was also denied and he appealed. The Ninth Circuit Court affirmed the denial of the second motion. Again the decision of the Ninth Circuit Court was reversed by reason of the limitations placed on motions under 2255 by the Circuit Court.

Now we are faced again with a decision of the Ninth Circuit Court declaring that the District Court exceeded its jurisdiction in the granting of relief. It overlooked and disregarded the fact that both Marchese and Del Bono were proceeding under both habeas corpus, Section 2243 and Section 2255, so if the relief could be granted under either section, the judgment of the District Court should be affirmed.

The Circuit Court treating the proceedings as limited to 2255, declared under said section, the District Court could do one of four things: (1) Vacate the judgment and discharge the prisoner, or (2) resentence him, or (3) grant a new trial, or (4) correct the sentence. It stated that the District Court did none of these things but reduced the sentence in violation of the 60-day period provided by Rule 35, Federal Rules of Criminal Procedure.

The District Court did discharge the prisoner and impliedly vacated the judgment. At the hearing on Marchese's petition, a discussion took place indicating that the District Court intended to vacate the judgment and discharge the prisoner.[4]

> "The Court: Well, Mr. Parsons, I want to ask you a question. I am going to rule with you and I can rule, my thought is, on 2255. He has already been incarcerated for four and a half years . . ." [Rep. Tr. p. 74].
>
> "Mr. Parsons: I think you can modify. I must respectfully disagree with counsel for the Government. 2255 gives you full power. It says so in it. It followed the old English common law version of coram nobis and they merely put it in the statute—where there is a wrong, there is a remedy" [Rep. Tr. p. 74].
>
> * * *
>
> "The Court: Well, what will I do, I will dismiss the matter, using section 2255. I will order the defendant discharged at this time, his having served four years and how many months" [Rep. Tr. p. 76].
>
> * * *

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[4] DEL BONO CONCLUSION I:

That since the petitioner, Jesse Del Bono, was tried by this Court and was at the time his petition was filed and still is incarcerated at the Federal Correctional Institution at Terminal Island, California, within the territorial jurisdiction of this Court, the Court may treat the petition under either or both of Section 2255 and Section 2243 of Title 28, U.S.C. and has jurisdiction to determine this matter and grant such relief as appears appropriate.

"Mr. Schulman: (Assistant U.S. Attorney.) I do not understand the judgment your Honor . . .

The Court: Well, I am dismissing it under 2255.

Mr. Schulman: And you are granting the motion?

The Court: That is right, and I am discharging the defendant now on the theory that he has already served four years and how many months, so many months" [Rep. Tr. p. 77].

"The Court: I am doing it under 2255. Then in addition to that I am ordering him discharged, which Mr. Parsons requests, on the theory that he has already served" [Rep. Tr. p. 78].

"The Court: I said I am granting relief under section 2255. I am setting aside the sentence . . . I am going to vacate the sentence, but I am going to make it contingent on that and modify the sentence from 10 to 5 years. That is what Mr. Parsons advocates. He could be right and I could be wrong in the matter.

* * *

The Court: Well, I am ordering both ways. I am ordering 2255 and then as another condition I am modifying the sentence from ten years to five years."

As an additional precaution Attorney for Marchese suggested reduction to five years so that with the good time prison credit of Marchese he would be eligible for release from prison under Title 18 Section 4161 U.S.C. If the judgment failed to express the intention of the District Court to vacate the judgment and discharge the prisoner it was the fault of counsel, who submitted the form of the judgment for the judge's signature. The same evidence and statements applied to Del Bono, pursuant to stipulation by government and defense attorneys.

The Circuit Court devoted some time to its discussion that the courts can't determine good time credits, since that is up to prison authorities. There was presented in evidence a letter of the Bureau of Federal Correctional Institution at Terminal Island, California under date of August 8, 1962 to Judge Clarke indicating that Marchese had an outstanding and excellent prison record, which, of course, would entitle him to good time credits of 8 days a month (Title 18, Section 4161 U.S.C.) during his approximately 4½ years of incarceration.

> "You asked that this report be brief and therefore I will not cover in detail his adjustment at McNeil Island. Generally I can say that it was satisfactory and he maintained a clear conduct record.
>
> Marchese appealed to the Director and other members of the staff to be permitted to remain at this institution to facilitate family visiting and to aid in matter pending before your Court. He was assigned to our Culinary Department and close custody quarters because of the nature of his offense and length of sentence. His adjustment was such that after 7 months he was removed from close custody quarters and is now living in a regular dormitory. He continues to work in our Culinary Department and is now classified as a butcher's helper. His work reports since arrival have been consistently above average. His reports since January of this year have been predominantly outstanding. Because of this and his participation in other self-improvement activities he was granted an award of

> 2 days per month extra good time which became effective February 1, 1961. This was increased to include a monetary award of $10.00 per month for six months, effective April 1, 1962. You may be interested to know that our monetary awards are granted for specifically prescribed periods because of budgetary limitations.
>
> Marchese is now currently enrolled in a school program but did attend typing classes for a period of time. Father Riley reports that he is quite active in the Church and attends services regularly. In addition he seeks special counselling. His family visits as often as our visiting time will permit and his daughter recently was betrothed. You may be interested to know that she and her fianceé came to the Institution to seek this man's formal permission for the marriage and the engagement ring was given in our visiting room."

Thus the District Court was not invading the province of the prison authorities in its finding, but was only making a finding as to what the prison authorities had already determined. The same is true with respect to the fine prison record of Del Bono. If there had been anything in the prison records adverse to either petitioner the U.S. Attorney would have called it to the court's attention. Their excellent prison records were also admitted to show that their discharge should be granted to serve "the ends of justice".

(a) The decision of the Circuit Court declaring the relief accorded was in excess of the District Court's jurisdiction under 2255 is directly in conflict with the decision of this Court that the remedy under 2255 is "exactly commensurate with habeas corpus." *Hayman v. U.S., supra; Sanders v. U.S., supra; Hill v. U.S., supra.*

(b) Under *habeas corpus,* Section 2243, the District Court is given the discretion "to dispose of the matter as law and justice require". If the relief available under 2243 is not available under 2255, then the remedy under the latter section is not "exactly commensurate with habeas corpus". In view of the combined nature of the proceedings under *habeas corpus* and 2255 motion, may not the District Court grant the relief by discharging the prisoner, even though as an additional feature, the court reduced petitioners' sentences to five years to assure their release and discharge from custody by reason of the time served by them approximately 4½ years.

(c) Furthermore, since there was a joint proceeding, we submit that the District Court could grant partial relief under *habeas corpus* and partial relief under 2255, and incorporate the relief so granted in one judgment, because both matters were heard and determined that same time.

The decision of the Circuit Court that the District Court exceeded its jurisdiction in the relief granted is directly in conflict with decisions of other Circuit Courts. In the case of *Powell v. Wiman, supra* (5th Cir.), the District Court reversed the judgment and ordered the prisoner discharged for time served, declaring on page 282:

> "The Court's duty upon a habeas corpus hearing is to dispose of the matter as law and justice require. * * * From the present record without more, it would appear that Powell's discharge will serve the ends of justice".

The same ruling was made in *McKenna v. Ellis, supra,* 593 (5th Cir.). In the case of *Kinsella v. Looney* *supra* (10th Cir.), the court held that the District Court had jurisdiction to modify a 5-year sentence under 2255, even though the 60-day period had expired thereby preventing modification under Rule 25, of Title 18, U.S.C.

To resolve the conflicts above set forth and to settle the important question of the relief which the District Court may grant under Sec. 2243 or Sec. 2255 of Title 28, U.S.C., this Court should grant certiorari. (See Reasons for Granting the Writ, No. 2).

9. Whether a District Court Judge in His Discretion Can Review Matters in Either Section 2243 or Section 2255, Which Matters Though Previously Presented on Appeal Were Not Passed Upon Directly or Indirectly by the Circuit Court in Accordance With the Ruling in Sanders v. U.S., 373 U.S. 1.

In the original appeal from the judgment of conviction, certain points were raised by petitioners. The Circuit Court did not pass upon these points but merely affirmed the judgment of conviction without opinion (264 F. 2d 892). This Court denied certiorari without opinion (360 U.S. 930). On the second appeal from the judgment dismissing Marchese's petition for *habeas corpus*, again the Circuit Court did not pass on the merits (304 F. 2d 154). This Court reversed said decision and directed the District Court "to reconsider in the light of *Sanders*", and the District Court did so, and we submit that the District Court in his discretion can review matters either under Section 2243 or 2255 or both, which were not passed upon directly by the Circuit Court in accordance with the ruling in *Sanders v. U.S.*

Conclusion.

For the foregoing reasons we respectfully submit that this petition for certiorari should be granted and that the judgment of the Circuit Court be reversed and the judgment of the District Court be affirmed.

Respectfully submitted,

Burton Marks,
Attorney for Petitioner,
Michele Marchese,

Russell E. Parsons,
Attorney for Petitioner,
Jesse Del Bono.

Sol C. Berenholtz,
Of Counsel.

APPENDIX A.

Judgment.

United States District Court, for the Southern District of California, Central Division.

Michele Marchese, Petitioner, vs. United States of America, and Preston Smith, Warden of United States Correctional Institution at Terminal Island, California, Respondent. Civil No. 801-61—T.C. (Ancillary to Case No. 26762 C.D.)

The Petition of Michele Marchese for a Writ of Habeas Corpus, together with the Return thereto of Respondent, United States of America, the Supplemental Memorandum of Petitioner, Respondent's Supplement to the Return, etc., and the Reply of Petitioner thereto, came on for hearing before the Honorable Thurmond Clarke, United States District Court Judge, on the 4th day of September, 1963 at 2:00 P.M., Petitioner appearing by Russell E. Parsons, his attorney, and Respondent appearing by the United States Attorney, Francis C. Whelan, by J. Brin Schulman, Assistant United States Attorney, and after a partial hearing a continuance was ordered to September 9th, 1963. Evidence, oral and documentary was introduced, and the Court having considered the matter and having made its written Findings of Fact and Conclusions of Law, now makes its order and renders judgment as follows:

IT IS ADJUDGED that the sentence of Imprisonment heretofore imposed June 16th, 1958 for ten years imprisonment in the custody of the Attorney General of the United States on each of ten Counts to run concurrently, be and the same is hereby modified, reduced and corrected to be five years in the custody of the Attorney General of the United States on each of ten Counts to run concurrently.

IT IS ADJUDGED that defendant and petitioner has spent in excess of four years in custody of the Attorney General of the United States, and it appears that by reason of his good conduct in custody he has earned such good time as would render his immediate release appropriate.

IT IS ADJUDGED that defendant and petitioner be immediately released from custody.

DATED at Los Angeles, California this 30 day of September, 1963.

Thurmond Clarke,
District Judge.

APPENDIX B.

Judgment.

United States District Court, for the Southern District of California, Central Division.

Jesse Del Bono, Petitioner, vs. United States of America, and R. W. May, Warden of United States Correctional Institution at Terminal Island, California, Respondent. Civil No. 63-1361—T.C. (Ancillary to Case No. 26762 CD).

The Petition of Jesse Del Bono to Annul, Vacate and Set Aside and/or Modify the Judgment of Conviction in Case No. 26762-CD, filed pursuant to the provisions of Title 28 U.S.C. Sections 2255 and 2243 and the Opposition thereto filed on behalf of the Respondent, United States of America, came on for hearing on the 19th day of November, 1963, before the Honorable Thurmond Clarke, United States District Judge, the Petitioner appearing by Russell E. Parsons, his attorney, and the Respondent appearing by the United States Attorney Frances V. Whelan, by J. Brin Schulman, Assistant U.S. Attorney. The matter was then continued and came on for hearing on the 11th day of December, 1963, before said Judge.

At said hearing it was stipulated that the records, files and exhibits in the case of Marchese v. U.S. Civil No. 801-61-TC heard by the above Court and that the reporter's transcript in said case introduced in evidence at the hearing, might be deemed to be introduced in evidence by reference and considered by the Court as well as the reporter's transcript in the aforesaid ancillary case of U.S. v. Marchese and Del Bono.

The Court having heard the evidence and considered the matter, and having made its Findings of Fact and Conclusions of Law, now makes its order and renders judgment as follows:

IT IS ADJUDGED that the sentence of Imprisonment heretofore imposed June 16th, 1958 upon petitioner Jesse Del Bono for ten years imprisonment in the custody of the Attorney General of the United States on each of four counts to run concurrently, be and the same is hereby modified, reduced and corrected to be five years in the custody of the Attorney General of the United States on each of ten Counts to run concurrently.

IT IS ADJUDGED that said defendant and petitioner has spent in excess of four years and eight months in custody of the Attorney General of the United States, and it appears that by reason of his good conduct in custody he has earned such good time as would render his immediate release appropriate.

IT IS ADJUDGED that defendant and petitioner be immediately released from custody.

DATED at Los Angeles, California this 20th day of December, 1963.

Thurmond Clarke,
District Judge.

APPENDIX C.

Office of the Clerk, U.S. Court of Appeals, P.O. Box 547, San Francisco, Calif. 94101.

Feb. 10, 1965

Burton Marks
8447 Wilshire Blvd.
Beverly Hills, Calif.

Dear Sir:

In case No. 19172/19249 U.S.A. v. Marchese; U.S.A. v. Del Bono, an opinion was this day filed, in accordance with which a Judgment was filed and entered reversing, etc. and remanding appellees to custody forthwith, judgment of the Court below.

Pursuant to Rule 26, and unless the mandate is stayed by the order of the Court, or unless a petition for a rehearing of the cause to be filed meantime, and as provided by Rule 23, a mandate of this Court will be due to issue on the expiration of 30 days from date hereof.

Time for certiorari petition: Civil cases, 90 days; Criminal cases, 30 days.

Sincerely,

Frank H. Schmid,
Clerk.

APPENDIX D.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, and Preston Smith, Warden of United States Correctional Institution at Terminal Island, California, Appellants, vs. Michele Marchese, Appellee. No. 19,172.

United States of America, and R. W. May, Warden of United States Correctional Institution at Terminal Island, California, Appellants, vs. Jesse Del Bono, Appellee. No. 19,249.

[Feb. 10, 1965]

Appeals from the United States District Court for the Southern District of California, Central Division. Before: BARNES, JERTBERG and DUNIWAY, Circuit Judges; BARNES, Circuit Judge:

I—The History.

The history of this extraordinary combined matter is this:

(1) On June 16, 1958, appellees were each convicted following a jury trial for violation of 18 U.S.C. §371 and 21 U.S.C. §174—sale of more than two pounds of heroin.

(2) The judgments of conviction were affirmed by this court *per curiam* on April 15, 1959 (264 F. 2d 892).

(3) Petitioners for *certiorari* were denied by the United States Supreme Court—*Marchese v. United States,* 360 U.S. 930 (1959); *Del Bono v. United States,* 360 U.S. 938 (1959).

(4) Marchese and then Del Bono filed motions to annul, vacate and set aside their judgments of conviction under the provisions of 28 U.S.C. §2255 (Marchese, Clk's Tr. p. 98; Del Bono, Clk's Tr. p. 24). Both were denied on December 22, 1960 by the Honorable Thurmond Clarke, the same judge who had tried the appellees earlier. No appeal was taken by either appellee.

(5) On February 3, 1961, each filed motion for reconsideration of the court's order denying the §2255 motions. On March 14 and 15, 1961, each was again denied.

(6) On June 20, 1961, Marchese filed a petition for a writ of habeas corpus. This was denied by another district court judge, the Honorable Peirson M. Hall. Marchese appealed, and this court affirmed that denial. (304 F. 2d 154 (1962).)

(7) Marchese then filed a petition in the United States Supreme Court for a writ of *certiorari.*

(8) Del Bono had meanwhile filed a new motion under 28 U.S.C. §2255, which was denied by Judge Thurmond Clarke on December 27, 1961. No appeal was taken.

(9) The United States Supreme Court granted Marchese's petition for *certiorari,* and remanded the case to the district court for "reconsideration in the light of *Sanders v. United States,* 373 U.S. 1."

II—"Sanders v. United States."

We thus are required first to consider what the Supreme Court meant when it "remanded for reconsideration, in light of *Sanders v. United States," supra.*

Sanders, when charged with robbing a federally insured bank, declined assistance of counsel, signed a waiver of indictment, pleaded guilty, and was sentenced to imprisonment. When the subsequently filed a §2255 motion, he charged the indictment was invalid, that he had been denied assistance of counsel, and that he had been coerced into his plea of guilty. This motion *was denied without a hearing,* upon the ground the allegations were conclusionary (*i.e.,* lacked facts upon which conclusions could be based)—although the court added that the files and records showed conclusively that petitioner was entitled to no relief.

Sanders later filed a second § 2255 motion, alleging that at the time of his trial and sentence he had been mentally incompetent as a result of narcotics administered to him while in jail, and alleging specific fact in support of his claim. This second motion was denied without a hearing on the ground that his alleged mental incompetency could have, and should have been raised, at the time of his first motion.

On appeal from the district court's ruling on Sanders' second 2255 motion, this court affirmed in a *per curiam decision. Sanders v. United States,* 297 F. 2d 735 (1961). We noted that § 2255 provides that a second or successive motion for similar relief need not be entertained; that Sanders asked for "similar relief" (to set aside and vacate the sentence) and that § 2255 allowed the trial judge to exercise a reasonable discretion in determining whether Sanders in his first motion could and should not have specified his alleged mental incompetency from use of drugs at the time of his sentence. The Supreme Court noted our reasons for so ruling by quoting from our opinion (373 U.S. 6). It then reversed this court, holding that the second motion should have been heard.

As we read the Supreme Court's decision, our affirmance of the denial was erroneous because, both at common law and by the very nature of the writ of habeas corpus, res adjudicata is inapplicable to such writs, provided no abusive use of the writ can be demonstrated. *Price v. Johnston,* 334 U.S. 266 (1948); *Wong Doo v. United States,* 265 U.S. 239 (1924). The Supreme Court held that the language "similar relief" used in § 2255 "cannot be taken literally" (373 U.S. 13), but must be read as the material equivalent of § 2244. This section provides that a judge need not consider a petition for habeas corpus "if it appears that the legality of such detention has been determined . . . on a prior application . . . and the petition presents no new ground not theretofore prescribed and determined, and the judge is satisfied that the ends of justice will not be served by such inquiry." Thus alleging a previously unraised ground for such a writ ordinarily entitles a petitioner to a hearing on such new allegations. Mr. Justice Brennan, in the second part of his opinion in *Sanders,* lays down certain rules to govern the hearing of § 2255 applications:

(a) Where the second or successive application is shown, on the application, files and records of the case alone, to be conclusively without merit, ***the application should be denied without a hearing.***

> "Controlling weight may be given to denial of a prior application for federal habeas corpus of §2255 relief [note] only if (1) *the same ground* presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be

> served by reaching the merits of the subsequent application." (373 U.S. at 15.) (Emphasis added by this court.)

(b) The court then defines and gives helpful examples of the meaning of the terms "ground," "adjudication on the merits," and "the ends of justice."

(c) It also points out that if a *different* ground is raised, "no matter how many prior applications for federal collateral relief a prisoner has made," it cannot be considered "the same ground," as used in (a) above, but that "if a prisoner deliberately withholds [for example] one of two grounds for federal collateral relief," or abandons his ground, equitable principles require a finding that there exists an abuse of the remedy. *Fay v. Noia,* 372 U.S. 391 at 438-40, and *Townsend v. Sain,* 372 U.S. 293 at 317 (second case).

(d) And as a final caution, the Court says:

> "The principles governing both justifications for denial of a hearing on a successive application are addressed to the sound discretion of the federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits. Even as to such an application, the federal judge clearly has the power—and, if the ends of justice demand, the duty—to reach the merits." (373 U.S. at 18-19.)

Finally, the Court in *Sanders* ordered the remand, and a hearing of the motion (p. 20).

There obviously exists a considerable difference of opinion between counsel for the parties before us as to what the Supreme Court did or did not hold with respect to this petitioner's rights.

Appellee Marchese's counsel, in seeking favorable action before Judge Clarke, asserted "that the Supreme Court would not have granted *certiorari* if it had not agreed with at least some, if not all, of the grounds raised in the petition for the writ of habeas corpus." (*Marchese v. United States,* Clk's Tr. p. 82.) In appellee Marchese's brief before us (with new counsel appearing for him), we are urged to believe:

> "The Supreme Court.. , . granted certiorari . . . [and] we submit that the Supreme Court's decision effectively, completely and finally disposes of appellant's contentions herein." (Marchese, Reply Br. p. 8.)

On the other hand, the appellant United States states in its opening brief (p. 4, n. 6), with respect to the granting of *certiorari:*

> "There was nothing in this decision which ordered the district court to grant a hearing to Marchese, or which suggested that the Supreme Court felt there was any merit to the petition . . . In *Sanders* . . . the court . . . exempted its decision from those cases . . . 'where the second or successive application is shown . . . conclusively to be without merit. In such a case . . . the application should be denied without a hearing."

We cannot completely agree with either position, whether we consider a district court's examination of the "application, files and records of the case *'only'* a hearing," or not a hearing, the Supreme Court remanded the case with a purpose in mind, and we read that purpose as telling this court that there must be a determination by the district court of the charges made by petitioner Marchese. We doubt, however, if the Supreme Court intended to pass on, or to infer that it intended to pass on, the *merits* of Marchese's charges.

Both sides ask for too much. We conclude the Supreme Court ordered that the appellees herein were entitled to the same kind of *hearing* that Sanders was entitled to: at the minimum, a hearing to determine if there had to be a hearing. We do not understand that it passed on the merits of appellees' positions in any way. *Cf.: Habeas Corpus and Post Conviction Review,* 33 F.R.D. 363, 478-84.

III—The Trial Court's Ruling.

We next consider the action taken by the trial court.

On September 30, 1963, Judge Clarke ordered the appellee Marchese's ten-year sentence to be "modified, reduced and corrected to five years," and that Marchese be "immediately released from custody." This judgment and the findings of fact and conclusions of law in support thereof appear in the record (Marchese, Clk's Tr. pp. 172-82). It is from that judgment that this appeal is taken.

On November 12, 1963, Del Bono filed a petition to annul, vacate and set aside and/or modify the judgment of conviction; and on December 18, 1963, Judge Clark signed a judgment and findings and conclusions ordering relief to Del Bono identical to that granted Marchese. That judgment is likewise the subject of this appeal (Del Bono, Clk's Tr. pp. 34-43).

IV—Jurisdiction.

Thus, jurisdiction below rests upon 28 U.S.C. §§ 2241, 2243 and 2255. Jurisdiction here exists by reason of 28 U.S.C. §§ 1291, 1294, 2253 and 2255.

Marchese's petition was labeled a "Petition for Writ of Habeas Corpus" (28 U.S.C. § 2243). Del Bono's sought relief under *both* 28 U.S.C. §§ 2243 and 2255. The last paragraph of § 2255, in the opinion of petitioner's counsel (R. T. p. 4, ll. 20-21; p. 9, ll. 5, 6), and of the trial court (Marchese, R.T. pp. 52, 77, 78, 80, 81, 93, 122, 125; Del Bono, Clk's Tr. p. 32) and of this court, requires the motion to be considered as one under § 2255.

We consider both petitions and the joint appeal as one proceeding, in what we hereafter state.

The petitions acted upon by the trial court were not the same. Marchese charged:

(1) The judgment of conviction by use of "silver platter" evidence is in violation of the due process clause.

(2) Petitioner was denied a fair trial because one Donald Sussman conspired and agreed with federal and state authorities to ensnare the petitioner.

(3) The United States Attorney suppressed the truth and failed to disclose the truth concerning this agreement and conspiracy between Sussman and federal and state authorities.

(4) The use of evidence obtained by the electric recording device known as the Schmidt Transmitter was unlawful and violative of the Fourth and Fifth Amendments.

(5) The arrest of petitioner without a warrant, the search of his person and apartment, and of the Del Bono automobile, all violated the Fourth Amendment.

(6) The evidence obtained by the interception of an authorized telephone conversation violated the Federal Communications Act, Section 605, Title 47 U.S.C. and the Fifth Amendment.

Del Bono urged only grounds (3) and (4) above.

V—The Errors Alleged.

Seven specifications of error are alleged in appellant's brief.[1]

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[1] "SPECIFICATIONS OF ERROR

"1. The District Court was without jurisdiction to modify and reduce appellees' sentence from ten to five years.

"2. The District Court was without jurisdiction to order the immediate release of appellees from custody based upon 'good time'.

"3. The District Court erred in granting relief upon grounds which were or should have been raised on the direct appeal from appellees' judgments of conviction.

"4. The District Court erred in its Conclusions of Law that (1) it *could* treat the petitions either as for relief under Title 28, United States Code, Section 2255 or Section 2243; (2) That the constitutional rights of petitioners to a fair trial were so denied or infringed upon as to amount to a denial of due process.

"5. The District Court erred in its Findings of Fact to the extent that they referred [1] to agreements between narcotics agents and the informant, [2] promises of leniency by the narcotic agents to the informant, [3] suppression of evidence on the part of narcotic agents or by the Assistant United States Attorney, or [4] to denial of the constitutional rights of appellees.

"6. The Disrict Court erred in its refusal to strike appellees' respective petitions from the records of the two cases.

"7. The District Court erred in permitting appellees to claim a Fifth Amendment privilege at the hearings held on their respective petitions."

They may be and are summarized by appellant (Br. p. 24) as follows:

(1) The court granted a form of relief which it had no authority to grant, in a case which presented no basis for collateral relief whatsoever; (2) appellees did not sustain their burden of proof required to obtain the limited relief which 28 U.S.C. § 2255 authorizes. We now proceed to examine these alleged grounds of error.

When we refer herein to "T." or "Tr.", we refer to the Clerk's or Reporter's transcript on this appeal (Marchese, No. 19172 or Del Bono, No. 19249); when we refer to "*Trial* T." or "*Orig.* Tr.", we refer to the Clerk's and Reporter's transcript on the original appeal, No. 16151.

VI—Jurisdiction to Grant Relief Ordered.

We conclude that the district court order exceeded that court's authority and jurisidiction under 28 U.S.C. § 2255 in two respects.

A. Section 2255 authorizes the district court to do any one of four things: (1) "vacate and set aside the judgment and discharge the prisoner," or (2) "resentence him," or (3) "grant a new trial," or (4) "correct the sentence."

None of the first three courses of action was adopted. It could be maintained that the district court acted under the fourth alternative by correcting appellees's several sentences. But there was no showing that the original sentence was faulty; therefore, no "correction" of the *sentence* was authorized, absent an illegal *conviction.* The sentence was "modified" or "reduced"—and this was done because of alleged trial errors uncovered by the district court. If the court's position is sound that error in fact occurred, of a kind that would justify granting of a § 2255 motion, appellees' sentences should have been entirely vacated and set aside, and the prisoners discharged from the service of any time based on the illegal conviction.

If the court vacates and sets aside the judgment of conviction, then, of course, the prisoner must be discharged, or granted a new trial. If the sentence, as distinguished from the conviction, is illegal, then it may be corrected. But a judge cannot, without vacating the conviction because of a legal defect found therein, change or modify, after Rule 35's sixty day period has expired, a sentence that is itself proper, legal and lawful as a sentence. *Richards v. United States*, 212 F.2d 453, 454 (D.C. Cir. 1954), *cert. denied* 358 U.S. 886; *Affronti v. United States*, 145 F.2d 3 (8th Cir. 1944)[2]

To reduce a sentence under Rule 35 requires action without a sixty day statutory period. This sixty day period had long expired in each of these cases. Further, no attempt was here made to obtain relief under Rule 35. Rule 36 applies to clerical errors only. This cannot aid appellees.

What the trial court here sought to accomplish was apparently to exercise the equivalent of executive clemency. This he was not authorized or entitled to do. *Egan v. United States*, 268 F.2d 820 (8th Cir. 1959).

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[2] It appears the court below was led into error by the statement unsupported by statute or case law made by appellees' counsel that the court could "order the prisoner discharged for time served." (Marchese, T. 73-77, 128.)

Could it be argued that appellees could petition for a writ of habeas corpus seeking only a reduction of sentence without attacking their conviction or the illegality of their sentence? We think not. Section 2255 "was not meant to broaden the scope of attack upon a judgment and sentence permissible under habeas corpus, but rather to confine the relief . . . to the court where sentence was imposed." *Crow v. United States*, 186 F.2d 704, 706 (9th Cir. 1950). And see: *United States v. Murray*, 275 U.S. 347 (1928); *Richards v. United States, supra.*

> "It should be observed that the Government's brief suggests that 'while the Court had authority . . . to set aside Appellant's sentence of January 4, 1960, and resentence Appellant, the Court had no authority or power to amend Appellant's sentence.' Manifestly in 1962, when the District Court amended Jenkin's 1960 sentence, the time period, providing for the reduction of a sentence through the exercise of discretion, had passed. [Fed. R. Crim. Proc. 35]. And the statute pertaining to remedies on motions attacking sentence [28 U.S.C. § 2255] does not provide for an amendment of sentence. Rather, it restates and simplifies the ancient writ of coram nobis so that an erroneous sentence may be vacated or set aside without resort to habeas corpus." *Jenkins v. United States*, 325 F.2d 942, 945-46 (3d Cir. 1963).

B. The district court likewise exceeded its authority and jurisdiction in finding "that by reason of his [defendant and petitioner] good conduct in custody he has earned such good time as would render his immediate release appropriate." (Marchese, Tr. p. 182.)

The federal prison system is operated in all its aspects by the Attorney General, part of the executive branch of the government, and not by the judiciary. 18 U.S.C. § 4001. *Tabor v. Hardwick,* 224 F.2d 526 (5th Cir. 1955); *Powell v. Hunter,* 172 F.2d 330 (10th Cir. 1949).

"Good time" is a matter for prison authorities, not the courts, except in those extreme cases where the Bureau of Prisons or the Attorney General act arbitrarily or fraudulently or abuse their authority. Any such finding must be supported by substantial evidence (*Lloyd v. Heritage,* 199 F.Supp. 46), and none was offered or suggested herein.

The court is without jurisdiction to entertain a "motion of this sort" under 28 U.S.C. § 2255, for that section "merely provides a remedy in the nature of Writ of Error Coram Nobis for attacking the judgment under which a prisoner is incarcerated." *Costner v. United States,* 180 F.2d 892 (4th Cir. 1960).

We thus hold in two respects the relief granted was erroneous.

VII—The Limits to Relief That May Be Granted in § 2255 Proceedings.

Section 2255 cannot take the place of an original appeal. More properly stated, § 2255 may not be invoked to relitigate questions which were or should have been raised on a direct appeal from the judgment of conviction. *Dodd v. United States,* 321 F.2d 240 (9th Cir. 1963); *Black v. United States,* 269 F.2d 38 (9th Cir .1959).

Here there was no opinion by this court from which we can authoritatively determine what was or was not raised on the appeal from the judgment of conviction (or what should have been raised). However, an examination of the appellant's brief, filed with this court by experienced defense counsel on the original appeal (No. 16151) indicates two points were originally raised—(1) the use of "intercepted" evidence forbidden by 47 U.S.C. § 605 (Communication Act of 1934); and (2) the insufficiency of the evidence to support the jury verdict, with particular reference to the testimony of Sussman, and the fact that he was a user of narcotics, a paid informer, and had received lenient treatment (two years) when sentenced by Judge Byrne. No. 16151, Op. Br. p. 15, ll. 1-4.) Appellee's brief (for the government) in that earlier appeal states:

> "The major point of appellants' is that the case is founded upon the testimony of the informant Sussman, and that as such, he is unreliable. This argument was made to the jury, and rejected by it." (Br., p. 12)

Appellants in the earlier appeal then applied for leave to file an additional and supplemental brief, which was allowed by this court. By it, appellants urged as a defense (3) entrapment and (4) the Fifth Amendment "due process" argument with respect to the concealed radio transmitter, alleging it to have constituted a trespass. (Dissenting opinions—*On Lee v. United States,* 344 U.S. 747 (1952).)

Thus it might well be argued that appellees are now precluded from again raising under a § 2255 application all the alleged errors herein specified, because each has been heretofore raised on the appeal in chief, determined adversely to appellees by this court (244 F.2d

892), and denied review by the Supreme Court (360 U.S. 930, 938).

On the possibility, however, that the alleged suppression of evidence by the United States Attorney raises an issue *not* heretofore considered by any appellate court, we consider it necessary to examine that charge. We cannot be certain that the "suppression of evidence" charge was that relied upon by the trial court. We can only assume it may have been.

We have read the transcript of the proceedings below on the hearing of appellees' motions. Government counsel at the hearing repeatedly asked the court to delineate on which of the six grounds urged the petition for relief was to be granted. This the court repeatedly declined to do.

> "The Court: I don't feel that that is necessary. I am modifying the judgment. I feel that is all the court is required to do after the order came down from the Supreme Court." (Marchese, Tr. p. 129.)

Despite the court's reluctance to delineate the specific grounds from his grant of relief, we feel the record clearly indicates that the principal and only real issue presented by the evidence related to whether the Assistant United States Attorney suppressed evidence, or knowingly permitted the witness Sussman to lie on the stand. Appellees relied upon evidence of favors granted to Sussman as the substance of their allegations of impropriety and this was the issue which appellant government thought it was required to meet. (Marchese, Tr. p. 95.) The hearing proceeded on this assumption.

We are fortified in this position by the fact the SOLE SPECIFIC finding in the Findings of Fact relating to a lack of fair trial is "the failure" of the Assistant United States Attorney "to disclose to the Court and jury the disposition of the State and Federal cases" against Sussman. (Finding VI; Marchese, Tr. p. 176.)

We thus proceed to examine the validity of the district court order by focusing our attention on the alleged improprieties in the conduct of the Assistant United States Attorney.

VIII—The Findings.

Turning to the findings here made in the district court, we find:

> "I
>
> "That on January 29th, 1958, one Donald Sussman was arrested by Narcotics Agent Malcolm Richards, under a complaint filed by the United States Attorney, wherein he was charged with a violation of Title 21 Sec. 174 U.S.C. and taken to the office of the Bureau of Narcotics in the Federal Building, Los Angeles for a conference with Richards, Howard Chappell, head of the narcotics bureau, and other narcotic agents. That an arrangement was made or some form of promise was given to him by agent Malcolm Richards, the narcotics agent in charge of the investigation of petitioner Michele Marchese, that if he would cooperate in bringing about the arrest and conviction of Marchese, he, Malcolm Richards, would try to obtain some consideration for Sussman.
>
> "That although Malcolm Richards denied any such promise, arrangement or assurance, the Court finds from the evidence that some such promise,

arrangement or assurance was in fact made or given to Sussman.

"II

"That after said arrangement made with Sussman, he was taken before the United States Commissioner and released on his O. R. and thereafter worked with the Government as a special employee, unknown as such to Marchese. That he received from the narcotics bureau approximately $600.00 for his services; that Malcolm Richards also contacted and advised Mr. Horton, Chief probation officer of the Los Angeles County Superior Court, of such cooperation and also the Federal Probation Officer.

"III

"That as a consequence of Malcolm Richard's activities aforesaid, the United States Attorney on or about March 26, 1958, dismissed the complaint against Sussman, filed under Section 174 of Title 21, U.S.C. and filed under Section 174 of Title 21, U.S.C. (sic) and filed an information against him under Sections 4704 and 7239 of Title 26, U.S.C., to which Sussman pleaded guilty, waiving an indictment and was sentenced to two years by U. S. District Judge William B. Byrne for two years only with a recommendation that he be sent to the United States prison hospital at Fort Worth, Texas.

"IV

"That at the time of the trial of Marchese, Sussman testified as follows:

> 'Q. As a matter of fact, Mr. Sussman, you actually are using information against these men

solely for the purpose of getting a lighter sentence in your case, isn't that true?

A. That is correct, one of the reasons.

Q. One of the reasons. You knew that if you could give the Government agents some information about anybody the evening that you were arrested, that you would probably be able to get a lighter sentence or perhaps off, isn't that true?

A. Probably.'

"V

"That at that time Mr. Sussman had already been granted great leniency, both by the Government and the Superior Court of the County of Los Angeles, and the United States Attorney should then have disclosed to the court and jury what had been done for Mr. Sussman.

"VI

"The agent Malcolm Richard testified at the trial of Michele Marchese as follows:

'Q. Was anything said by you or anyone in your presence to Mr. Sussman that if he would go to Mr. Marchese's apartment he would—and cooperate with you, that he would receive a lighter sentence on the criminal matter then pending?

A. It wasn't said in my presence, if it ever was said.'

That the United States Attorney by a technical objection prevented disclosure of any arrangement between Sussman and Agent Richards in the following manner:

'Q. Mr. Richards, you say that you first met Mr. Sussman, I believe, on the 29th of January, is that right?

A. I first met him, yes.

Q. Was that as a result of an arrest of some kind?

A. Yes, sir.

Q. Involving narcotics?

A. That is correct.

Q. Did you make some kind of an agreement with him?

Mr. Bevan: I will object. "Agreement" calls for a conclusion of the witness.

The Court: Yes.

Mr. Bevan: I have no objection to facts coming out, but—

The Court: All right. I will sustain the objection.'

"That at the time Mr. Sussman testified he had already been prosecuted by way of Information and in this Court sentenced to two years in custody of the Attorney General, with a Recommendation of commitment to the Federal Institution (Hospital For Narcotic Addicts) at Fort Worth, Texas.

"He had not been prosecuted pursuant to Sec. 174 of Title 21 U.S.C. notwithstanding the original complaint charged a violation of such section;

"He was permitted to waive indictment, pled guilty and was sentenced by one of the Judges of this Court to two years in custody of the Attorney General of the United States, as just above set forth. The Court finds that Agent Richards, a Federal Bureau of Narcotics agent, assigned to this case had talked with the Chief Probation Office of Los Angeles County concerning Mr. Sussman.

"Mr. Sussman had been convicted of a violation of the California State Narcotics Laws in case No. 179982 in The Superior Court of the State of California, For the County of Los Angeles, June 29th, 1956. He was in violation of Probation. On recommendation of the County Probation Officer of the Superior Court of the State of California, For the County of Los Angeles, on April 30th, 1958, probation was revoked as to Mr. Sussman and the Court terminated the same and Sussman sentenced to one year to run concurrently with the Federal sentence then being served at Fort Worth, Texas, as aforesaid.

"Mr. Sussman did not disclose the above disposition of his cases to the Court and Jury.

"The Court finds that the Federal Narcotics Officers were aware of this disposition, were aware of Sussman's testimony and the failure on his part to disclose this disposition to the Court and Jury.

"The Court further finds that the disposition of the State and Federal cases was known to or should have been known to the Assistant United States Attorney prosecuting the case and the failure to disclose to the Court and Jury the disposition of the State and Federal cases denied Michele Marquese (sic) the fair trial to which he was entitled.

"VII

"That Sussman was a narcotics addict; that during the period of the investigation of Marchese from January 29th to May 13th, 1959, Sussman was under the influence of narcotics, taking from three to four grams a day and having a shot every 4½ to 5 hours, his habit costing him about $75.00 a day; that he had taken narcotics off the top on sales previously made by him but did not take any off the top on the three occasions involved in this Marchese case; that he took a shot on each occasion before he went to the Marchese apartment and took shots before meeting with the narcotic agents on other occasions. That agent Richards and other agents in the investigation knew of Sussman's narcotic record and knew or should have known that he was an addict.

"VIII

"That Sussman was and had been a friend and acquaintance of Marchese for several years prior to the investigation, and was on friendly terms with Marchese at that time; that on three occasions, to wit, January 30th, January 31st and February 7th, 1958, a Schmidt radio transmitter was concealed on Sussman and he was sent by Agent Richards into the apartment of Marchese at 11032 Moorpark Avenue in North Hollywood, California, while he was there the conversation taking place between Sussman and Marchese was transmitted to the receiving device in the possession of Agent Richards and Deputy Sheriff Farrington of the Los Angeles County Sheriff's Department; that they listened in on such conversations and were permitted over objections of the defense counsel to testify what they overheard taking place in Marchese's apartment; that Marchese was unaware of the existence of such transmitter and of the transmission of the conversations taking place in his apartment, and did not consent thereto.

"IX

"That on several occasions at the instigation of Agent Richards, Sussman telephoned Marchese at the latter's apartment; that Agent Richards placed his ear as close as possible to the ear piece of the telephone used by Sussman so as to hear the conversation of Marchese; that Agent Richards was permitted over objection by Marchese's counsel to testify what he overheard.

"X

"That Marchese was arrested on March 13th, 1958, without a warrant to arrest; that the Dodge automobile not in possession of Marchese in which narcotics were found and removed by Sussman and Government Agents on the day of the arrest, was searched and the narcotic removed without a search warrant; that following the arrest of Marchese, his apartment was searched without a search warrant, but that no narcotics nor marked or Government money was found in his apartment or on his person.

"XI

"That certain state officers from the Los Angeles County Sheriff's Department participated in the investigation and testified in the case, including Deputy Sheriff Farrington's participated in the use of the Schmidt transmitter aforesaid. * * *"

Conclusion II

"That the constitutional rights of petitioner to a fair trial were denied and so infringed upon as to render the judgment subject to collateral attack.

"Rights guaranteed to him under the Fourth and Fifth Amendment to the Constitution were denied him and so infringed upon as to amount to a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States."

Conclusion III

"The Court concludes that it would be fair, equitable and just to modify, reduce and correct the sentence to be five years in the custody of the Attorney General of the United States, and it appearing that defendant petitioner has spent in excess of four years in custody of the Attorney General of the United States, and it further appearing that by reason of his good conduct in custody he has earned such good time as would render his immediate release appropriate. It is further ordered that he be ordered immediately discharged from custody."

We immediately note certain inexactness, uncertainty and some contradictions appearing in the findings of fact, particularly with reference to the one point upon which relief was sought: the proposition that there was a "promise" made by Agent Richards to "stool pigeon" Sussman to cooperate. We point out the following:

1. In Finding I (Marchese, T. 173): "That an arrangement was made *or some form of promise* was

given"; (emphasis added) that although denied, "*some such* promise, arrangement or assurance was . . . given. . . ." (Emphasis added.)

2. In Finding III (Marchese, T. 174): that the United States Attorney "dismissed the complaint against Sussman, filed under Sec. 174 of Title 21 U.S.C., and filed under Sec. 174 of Title 21 U.S.C. (sic), and filed an information against him under Sections 4704 and 7239 of Title 26, U.S.C. . . ." We assume this second reference to § 174 of Title 21 U.S.C. was a mere typographical error.

3. In Finding V (Marchese, Tr. 174): that Sussman "had . . . been granted great leniency" without describing it in paragraph V, or referring to paragraph III (if that was what is referred to).

4. In Finding VI: that the United States Attorney by technical objection "prevented disclosure of any arrangement between Sussman and Agent Richards *in the following manner*. . . ." (Emphasis added.) Whereas, the Reporter's Transcript quoted and relied upon fails to disclose any "prevention." To the contrary, the United States Attorney stated: "I have no objection to facts coming out, but. . . ." He was then interrupted by the court, who sustained his objection, and thereafter no attempt was made by defense counsel to elicit from the witness facts, as distinguished from the witness' conclusions. (Marchese, T. 175)

5. In Finding VI (Marchese, T. 176): the statement: "Mr. Sussman did not disclose the above disposition of his cases to the Court and jury," when there existed the positive previous finding Mr. Sussman *had* testified as to one case (Marchese, T. 175).

6. That there were no specific findings of fact supporting Conclusion of Law II, second paragraph (respecting the alleged denial of due process law).

7. That it cannot be determined what findings of fact, if any, support the conclusion of law that Marchese was denied due process of law.

8. That there are no conclusions of law specifically or demonstratively founded on—

(a) Finding of Fact VII, relating to Sussman's narcotic addiction;

(b) Finding of Fact VIII, relating to the use of a Schmidt radio transmitter;

(c) Finding of Fact IX, relating to the introduction of overheard telephone conversations;

(d) Finding of Fact X, relating to Marchese's arrest without a warrant, or the search of the Dodge automobile or the search of Marchese's apartment;

(e) Finding of Fact XI, relating to the participation of State officers in the investigation, their testimony at the trial, or their participation in the use of a Schmidt transmitter.

9. That it cannot be ascertained how or in what manner or to what degree, if any, the district court relied upon Findings of Fact VII to XI, inclusive, if at all, in coming to Conclusion of Law II; as to either the first or second paragraphs thereof.

10. That it cannot be ascertained how or in what manner or to what degree, if any, the trial court relied upon Finding of Fact VI in arriving at Conclusion of Law II, second paragraph.

11. That it cannot be ascertained from any findings or conclusions made by the trial court as to the *materiality* of Findings of Fact VII to XI, inclusive, with respect to either paragraph of Conclusion of Law II or of Conclusion of Law III.

12. That it cannot be ascertained from any findings or conclusions made by the trial court as to the *materiality* of Finding of Fact VI with respect to either paragraph of Conclusion of Law II or of Conclusion of Law III.

Federal Rules of Civil Procedure 52(a) requires findings "in all actions tried upon the facts. They are essential to aid the appellate court on review." *Irish v. United States,* 225 F.2d 3 (9th Cir. 1955), 21 Fed. R. Serv. 52a3, case 1; *Brooks Bros. v. Brooks Clothing,* (S.D.Cal. 1945) 9 Fed. R. Serv. 52b14, 5 F.R.D. 14. *Welsch Co. of California v. Strollee of California,* 290 F.2d 509 (9th Cir. 1961).

We must assume fact findings will be made on essential facts only, and not on those which are superfluous or immaterial. But we also require, and are entitled to the benefit of clear and *explicit* findings on any factural issue tried without a jury. 5 Moore 52.06-(3)(4)(5), 52.10.

Those before us are deficient in the respect heretofore pointed out.

For that reason it is impossible for this court to determine the materiality of the following Findings of Fact, which are urged here by petitioner below as error, but upon which no conclusions of law are based primarily:

VII—With respect to Sussman's narcotic addiction.

VIII—With respect to the use of the Schmidt radio receiver.

IX—With respect to "overheard telephone conversation."

It could be argued that we must assume that it is for this reason (*i.e.,* their immateriality) that no causal connection is stated or shown between Findings VII, VIII and IX, and any Conclusions of Law. If there is no causal connection such findings should not have been made, and if there was no reliance on such fact findings, explicit reference is likewise required between such findings and any conclusions resting thereon in order to enable this court to compare the conclusions and findings, and the facts found, with the evidence appearing in the record in our search for "proper findings" to support the ruling.

We find before us but one explicitly related finding of fact to one conclusion of law, *i.e.,* the last paragraph of Finding VI to the first paragraph of Conclusion II.

We can only conclude the findings are not sufficiently clear to permit us to properly evaluate them, and if for no other reason than this, we would be required to reverse the judgment and remand for further findings and conclusions. However, this does not dispose of the real issue here involved — the alleged suppression of evidence by the government. At the risk of unduly prolonging this opinion, we feel this issue must be discussed.

IX—The Prosecutor's Suppression or Failure to Disclose the Truth.

This finding goes to the heart of appellant's position. Under the peculiar circumstances of this matter, we feel obliged to test this one particular finding of fact and the resulting conclusion of law, to determine if the facts in the case are sufficient to support a ruling below that would be within that court's competence and jurisdiction.

The last paragraph of this vital Finding VI is

> "that the disposition of the State and Federal cases [against Sussman] was known to or should have been known to the Assistant United States Attorney prosecuting the case and the failure to disclose to the Court and Jury the disposition of the State and Federal cases denied Michele Marquese (sic) the fair trial to which he was entitled."

At the time Sussman testified, the change of the charge against him had already been made by the government. The original indictment charging a violation of § 174, Title 21 U.S.C., had been dismissed, and Sussman was charged with violating §§ 4704 and 7239 of Title 26, U.S.C. (the lesser "tax" penalties) and sentenced on April 30, 1958. His waiver of indictment, plea of guilty and sentence were matters of public record in the same district court in which he testified against Marchese (although before a different judge). It is difficult for us to understand why a matter of public record was required to be brought to the attention of the trial court; but it was—he commented on it (*supra*).

We thus have three questions before us.

(1) Was the defendant Sussman *in fact* promised leniency or favors for testifying against Marchese by officers or prosecutors?

(2) Did the Assistant United States Attorney know, or should he have known, of it?

(3) If both of these questions are answered affirmatively, was the prosecutor under a duty to disclose such facts to the judge and jury?

Question (1) is purely one of fact; question (2) partly fact and partly law; and question (3) one of law, the determination of which usually depends upon facts developed at the trial.

We turn to appellees' (petitioners') charges below:

> "3. During the petitioners' trial, the United States Attorney abused the privileges of his office by actively participating in the suppression of the truth and failing to disclose the truth concerning the obvious agreement or understanding between Donald Sussman and the Federal and State authorities, contrary to their oath of office and in disregard of petitioner's constitutional rights under the Fifth Amendment." (Marchese, C.T. 21, *et seq.;* Del Bono, C.T. 10, *et seq.*)

We turn to the evidence offered at the hearing in support of Marchese's third ground and Del Bono's first ground, suppression of evidence. We cite in the margin first the appellant's resume of the evidence.[8]

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[8] "Appellee Marchese called only one witness, former Federal Bureau of Narcotics Agent Malcolm Richards [Marchese, R. T. 9]. Agent Richards specifically denied the existence of any agreement between he (sic) and the informant Sussman, or that

We note that appellees charge the statement made in the margin as note 2 "omits essential facts." We

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he or any other agent had promised Sussman any leniency should he cooperate with the government in any investigation, or that to his knowledge, Sussman had testified other than truthfully at the trial. [Marchese R. T. 13, 24, 36, 37]. The Government called former Assistant United States Attorney Bruce Bevan [Marchese R. T. 58] and Appellee Michele Marchese. [Marchese R.T. 45.] Attorney Bevan similarly denied any knowledge of an 'agreement' between any of the agents and Sussman, or that any agent had promised 'leniency' to Sussman in exchange for his cooperation, or that he had endeavored to suppress evidence at the trial. [Marchese, R.T. 59-60.] Several questions were propounded to Appellee Marchese by Government counsel, relating to the facts of the case. [note] In each instance, upon advice of counsel, appellee refused to answer the questions under claim of the Fifth Amendment privilege against self-incrimination. On each occasion, the court treated the verbal refusal by the appellee as though it were an 'objection' and 'sustained' it without further explanation. Although Government counsel moved to strike the petition based on the effective denial of the Government's right of cross-examination, and, although there was no statement by appellee or his attorney as to the basis for his apprehensiveness, other than the fact that he had previously been prosecuted for perjury, the Government's motion was denied. [Marchese, R.T. 44-48.]

"In the Del Bono case, the situation was quite similar. Moreover, prior to the Del Bono hearing, Government counsel expressed his intention to take the deposition of appellee Del Bono at the Federal Correctional Institutional, Terminal Island, California. Appellee's attorney informed the Court and the Government counsel that, because Del Bono had previously been indicted for perjury, he had advised Del Bono to '. . . avail himself of his privileges and rights under the Fifth Amendment of the Constitution of the United States and refuse to answer any questions.' Upon the acknowledgement of the Court that it would amount to a waste of time, trouble and expense for the Government to so depose appellee, Government counsel advised the court that it would not attempt to take his deposition prior to the hearing. [Del Bono, R.T. 14-16.] At the hearing itself, the same evidence offered at the Marchese hearing was introduced by appellee and no witnesses called on his behalf.

"Appellant called Appellee Del Bono as a witness. After acknowledging his name and that he had signed the verified petition on page 17 thereof [Del Bono, C.T. 26-27], upon advice of counsel, appellee proceeded to refuse to answer some 17 questions propounded by the Government. [note]

therefore place their resume in the margin,[4] with respect to the "leniency" promised.

"Counsel for appellants moved to strike the petition and argued the following in support thereof:

> 'Mr. Schulman: I move to strike the petition, your Honor.
>
> 'Your Honor, this Petition is filed with this court; it is the moving document upon which these proceedings are based. If the witness chooses to bring a petition into this court, then he should be willing to stand cross-examination on that petition or the petition should have no validity before the court. As a unique document, subject to no cross-examination, the witness being subject to no cross-examination, then the proceeding should conclude right now and that pleading should be stricken.'

"The court denied appellant's motion to strike the petition, and sustained appellee's 'objections' as to each question. . . .

"The only basis suggested by appellee's attorney as to why it was believed appellee should claim the Fifth Amendment was that the petition had been . . . 'sworn to in prison before one of the prison officials, and it is here, and I do not believe under the circumstances they are entitled to cross-examine on it', and a subsequent reference to the fact that appellee Del Bono had previously been prosecuted and convicted for perjury. The Court inquired no further into the matter, [Del Bono, R.T. 28-29, 34-36] and did not order the witness to answer any of the questions. [Del Bono, R.T. 36.]" (Appellants' Opening Brief, pp. 17-21.)

[4] "That he had been a narcotics agent since 1949; that he and other agents discussed with Sussman what might be done in connection with criminal proceedings against him; that a discussion was had in the office of the Bureau of Narcotics in the Federal Building in Los Angeles; that he was in court when Sussman testified; that prior to Sussman's testifying he discussed with Sussman what, if anything, the government would do for him; that he told Sussman that whatever Sussman did in order to help make a case against his source of supply, they would bring to the attention of the United States Attorney who was handling the case, and in that connection it was up to the United States Attorney, that he, Richards, couldn't promise Sussman in the Superior Court of California; that he told Sussman that he would talk to the state officers and see what could be done on Sussman's behalf; that he did talk to the state officers, the Chief Probation Officer, Mr. Holton; that he told Holton that Sussman was aiding the government; that he learned prior to Sussman's testifying that Sussman was sentenced in the Superior Court on April 30, 1958 and that Sussman was given a one-year jail sentence to run concurrently

We also note the testimony of Bruce Bevan, Esq., the Assistant United States Attorney, using appellees' version of his testimony.[5]

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with the sentence (2 years) of the Federal Court; that the 'Karl Holton' signing the probation report, of which a certified copy was introduced (Exhibit 1) and read in evidence (R. T. pp. 17-21), was the same Holton he had talked to; that he knew Sussman pleaded guilty to a tax count and was sentenced to Fort Worth, Texas, by District Court Judge Byrne; that prior to such sentence he talked with the Federal Probation Officer and advised the latter that Sussman was cooperating with the Government.

* * *

"That he never promised Sussman that the latter's sentence would be more lenient; that he told Sussman that such was up to the judge, but that he would bring the matter to the attention of the United States Atorney handling the case . . .; that he never told Bruce Bevan, Assistant United States Attorney, that he had any agreement or bargain with Sussman; that he didn't know if Mr. Bevan made an agreement with Sussman; that he never told the Federal Probation Officer to recommend a lighter sentence; that he didn't tell Mr. Holton to make the recommendation made by the latter (Exhibit 1, R.T. pp. 17-21).

". . . that he attempted to listen in on certain telephone conversations; that he went to see Mr. Holton, Probation Officer for the County of Los Angeles, to tell of the help and cooperation Sussman intended to give federal agents; that he did not go there to help Sussman necessarily, he did not go to hurt Sussman, and that his going to Holton would help Sussman; that he did tell Holton that Sussman was aiding the state and federal agents and cooperating with them; that Sussman was helping; that Sussman was paid a total of $600.00.

ON RECROSS EXAMINATION by the Assistant United States Attorney (R.T. pp. 38-39) Richards testified:

"That the electronics device carried by Sussman on his person at the time of his contacts with Marchese was furnished Sussman as part of the conduct of the Bureau of Narcotics investigation of a criminal case."

[5] "That he was the Assistant United States Attorney assigned to the Marchese case; that he never had any conversation with Sussman wherein he promised leniency; that he spoke with Sussman after he had participated in the investigation and after Sussman had been sentenced; that he did not know whether or not any of the agents of the Federal Bureau of Narcotics made any agreement with Sussman or any promises of leniency; that he did not have any intent to suppress evidence;

We conclude that there was *no proof* that defendant Sussman was promised "leniency" as such. He *was* promised by *Richards:* (a) that whatever Sussman did to aid the prosecution "would be brought to the attention" of the United States Attorney; (b) that Richards, the Federal Bureau of Narcotics agent, told the State probation officer Sussman was "aiding" the federal government, and was giving the federal government "help and cooperation"; that he was "helping," and Bevan, the Assistant United States Attorney did prepare the lesser tax counts for Sussman's plea, and subsequent imprisonment.

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that he had no knowledge that any agreement in fact had actually occurred when he made his objection; that he did not know that Sussman had been arrested in January until Sussman testified at the trial.

* * *

"That he tried the Marchese case; that prior to trial he met Richards and other agents and deputy sheriffs, preparing the case; that he discussed the available evidence with Richards on several occasions prior to trial; that he talked with Sussman before the latter went on the stand; that he may have known, at the time, of Sussman's long record of use of narcotics; that Sussman's record was available and he undoubtedly knew what it was; that he knew prior to the Marchese trial that an information had been filed against Sussman on March 26, 1958, and Sussman had pleaded guilty in case No. 26687 and had been sentenced on a narcotics charge; that he had prepared the information based on a tax count under section 4702(a) and 7237, Title 26 U.S.C.; that Sussman could have been indicted for a more serious offense with the evidence that was available; that prior to the filing of the information he knew Sussman was going to be a witness against Marchese; that prior to Sussman's sentence he probably knew Sussman was under a charge in the state Superior Court; that he did not know whether, at this time, he knew that Richards had talked with the Chief Probation Officer; that at the time of the Marchese trial he knew Sussman had been sentenced to Fort Worth; . . . that he interviewed Sussman but couldn't recall whether it was before the filing of the information or just before the trial; that before he filed the information he had a report from the narcotics officers as to the involvement of Sussman in trafficking in narcotics." (Reply Br. of Marchese, pp. 13-14.)

"The obvious agreement" charged against the United States Attorney was thus one resting solely on an inference, apparently made by the trial judge, rather than any direct evidence, for there was none to support it.[6]

We pass for the moment the inherent difficulties in proving an "agreement" when the terms thereof have been found to be unknown; and assume, as the court below did, that there was "*some such* promise, arrangement or assurance" (Finding I) between Richards and Sussman, that Richards "would try to obtain some consideration for Sussman."

This inferred agreement, of course, is not what is charged in Marchese's third ground and Del Bono's first—rather it is that "the United States Attorney [not Richards] abused the privilege of his office . . . by suppressing and failing to disclose the inferred truth."

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[6] Appellee Marchese repeatedly concedes his conclusions rest upon inference, implications, conjecture and surmise.

(1) *"It may be inferred."* (p. 36, n. 10(3). emphasis added.)

(2) His conference with Holton *"caused a recommendation by the Probation Officer."* (p. 36, n. 10(4). emphasis added.)

(3) *"[I]t may be inferred"* that Richards made mention of his promise. (p. 37, n. 10(2). emphasis added.)

(4) Judge Byrne *"must have had such a request to* impose a sentence of extreme leniency, and Judge Clarke *could reasonably have inferred* that such a request or recommendation was made." (Emphasis added.)

(5) Richards' testimony at the hearing is in conflict with his testimony at the trial — at least by implication. (p. 39.)

As appellee Marchese sums up his case:

> "In the instant case we can only proceed upon reasonable inference from the facts and rely upon circumstantial evidence to support our contentions."

At best then, Marchese's factual conclusions admittedly rest upon "reasonable inference" and "circumstantial evidence." Yet this weak reed, urges Marchese, renders Richards' answer "perjurious" (p. 39), and makes this case "fall clearly" within the purview of *Napue v. Illinois, supra. Powell v. Wiman, supra.*

To best aid appellees' position, we assume questions one and two raised above are answered in the affirmative, and also assume the trial judge could infer an assurance of leniency to a witness by a Federal Bureau of Narcotics employee, with the inferred "cooperation" and knowledge of an Assistant United States Attorney, in return for Sussman's cooperation as a witness in the prosecution of Marchese and Del Bono.

Was such encouragement to Sussman an act which prevented appellees from having a fair trial? Or deprived either of them of a constitutional right, under the facts of this case?

Parenthetically we note that the cooperation of one of several joint defendants in the prosecution of others, in the hope of saving his own skin, is as old as law itself. It seems one part of the unpleasant situation that goes with, and is an integral part of crime, seemingly a necessary part of crime's solution and prosecution and ultimate control, if not prevention. *Lisenba v. California,* 314 U.S. 219 (1941), *rehearing denied* 315 U.S. 826 (1942); *United States v. Vita,* 209 F. Supp. 172 (E.D. N.Y. 1962).

We turn to the third question under consideration—the prosecutor's duty under the circumstances of this case.

To fairly consider this, we must reconstruct, on the foundation of the evidence produced at the subsequent § 2255 hearings (notes 3, 4, and 5, *supra*) what occurred at the trial.

Appellee Marchese reaches the primary question of "suppression of evidence" on page 37 of his reply brief.

The Assistant United States Attorney, it is said, "not only was well aware of Sussman's record, and of the state and federal proceedings, and not only failed to disclose same, but by objection prevented their disclosure." The latter part of this statement is simply not supported by the record. We cannot agree with appellee Marchese's counsel that the government's objection "stopped the defense attorneys . . . from inquiring further into any arrangement, agreement, promise, or assurance." (Marchese's Br. p. 37) In truth, Assistant United States Attorney Bevan invited just the opposite —he *invited* defense counsel to go ahead with their questioning. (Tr. p. 175, ll. 20-21.)

We obviously do not question the rule that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." And we concede that rule applies when the State, though not soliciting false evidence, knowingly allows it to go uncorrected when it appears in evidence. *Napue v. Illinois, supra* at 269.

But we find no basis, either in the evidence at the first trial, at the hearing below on this matter, nor in the findings of fact, that would justify a conclusion that a proper "technical" objection to evidence made by the prosecution, sustained by the trial judge, and never again raised by the defendants' counsel, prevented disclosure of any fact. In truth, the exact opposite was shown and found (Tr. p. 175). The government objected only to the witness' conclusion, not to a recital of the facts. The court's ruling sustained the sole objection made on but one ground: that the question called for the witness' conclusion. (Tr. p. 175, ll. 17, 18.)

There is no question but that Sussman knew he could better himself and perhaps obtain leniency if he cooperated with the prosecution. He did not hide his hopes. (Orig. Tr. 419, ll. 1-10.) The court found he did not. (Finding IV.) He testified openly with respect to it at the trial. (Original Tr. pp. 419-22; 433-35; 450.) Government counsel advised court, counsel and the jury of it when making his opening statement (Orig. Tr. pp. 33a-43a). Government counsel so argued to the jury at the end of the case (Orig. R.T. 595). Agent Richards was cross-examined about Sussman's release on his own recognizance, and his sentence by Judge Byrne whereby he received two years imprisonment, a "light sentence." (Orig. T. 95-99.) The trial court commented, as a fact, on Sussman's plea of guilty before Judge Byrne (Orig. T. 99). Richards denied any promise made to Sussman in his (Richard's) presence. Both Richards and Assistant United States Attorney Bevan allegedly could not, and did not, *promise* Sussman anything except that he could continue to hope for leniency and consideration by the judge because of the fact that he had "cooperated." from a "promise," from a "deal," from a "contract," from a "promise," which appellees *infer* must have existed. Such an inference goes beyond what the record discloses, and there is no competent evidence of any concealment by anyone.

Sussman was cross-examined about his hopes and how he was treated (Orig. T. 412, 419-22; 450; 472-73) and his State arrest (Orig. T. 432-35) and the money paid him by the government to act as an informer (Orig. T. 435-36; 447-48).

Finally, original counsel for Del Bono *inferentially* (Orig. T. 654-55) and original counsel for Marchese *directly* (Orig. T. 670-76) argued to the jury all the facts now urged (save alleged *suppression* of evidence) in an attempt to impeach Sussman.

The evidentiary rule involved is expressed in Wigmore, Vol. III § 967 (3d ed.):

> "It bears against a witness' credibility that he is *an accomplice* in the crime charged and testifies *for the prosecution,* and *the pendency of any indictment* against the witness indicates indirectly a similar possibility of his currying favor by testifying for the State. So, too, the existence of a *promise* or just expectation *of pardon* for his share as accomplice in the crime charged." (Emphasis added.)

The basis for the rule is the general belief that everyone is interested in bettering himself and in saving himself from punishment, and hence that the testimony of such an accomplice testifying with the hope or existing possibility or promise of future benefit or leniency should be carefully tested and weighed and considered by the trier of fact. *Cf.: United States v. Masino,* 275 F.2d 129 (2d Cir. 1960); *Meels v. United States,* 163 F.2d 598 (9th Cir. 1947); *United States v. Hogan,* 232 F.2d 905 (3d Cir. 1956).

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the

> truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v. Illinois,* 360 U.S. 264, 269 (1959).

"The determination of the effect of such consideration as a motive for testifying is for the jury." *United States v. Bishop,* 188 F.Supp. 804 (E.D. Wis. 1960).

We cannot agree with petitioner that the facts of this case bring it within the rule of *Napue v. United States, supra,* or that *Powell v. Wiman,* 287 F.2d 275 (5 Cir. 1961), is controlling. In the latter case, Hatt, a prosecution witness, had been previously confined in a mental institution. The prosecutor of this Alabama defendant prevented inquiry on part of the defense as to Hatt's insanity. As the court said: "The State doggedly and successfully opposed every effort of the neophyte lawyer to cross-examine the witness as to his sanity," when it had evidence not available to defendant, of the witness' testimony.

In *Napue, supra* (a murder trial), Hamer, the principal state's witness, then serving a 199 year sentence for the same murder, *was promised* "a recommendation for reduction of his sentence" already meted out, if he would aid the prosecution of Napue. He then testified, in response to a question by the Assistant United States Attorney, that *he had received no promise* of any consideration in return for his testimony. Nothing was done to correct the witness' false testimony—known by the prosecution to be false. After trial, the same United States Attorney who had promised Hamer he would recommend a reduction in his sentence filed a petition on Hamer's behalf, detailing his promise to Hamer, and his subsequent assurances to Hamer "that every possible effort would be made to conform to the promise previously made to him." Napue, hearing of this petition, and knowing of Hamer's false testimony at the trial, filed his own petition, and obtained relief. Neither *Napue* nor *Powell v. Wiman, supra,* are in point.

We now turn to the fundamental question here presented:

Was there evidence to support the court's inferred conclusion that the Assistant United States Attorney abused his office by suppressing or failing to disclose "the truth" so as to deny appellees a fair trial, and violate their constitutional safeguards?

As we have seen, "the truth" allegedly so suppressed or not disclosed was "the obvious agreement or understanding between Sussman and Federal and State authorities" (Appellees' Br. p. 16), that he (Sussman) should receive leniency. It was not suppressed.

We find no basis in the record to support any claim that the Assistant United States Attorney suppressed or failed to disclose what Sussman hoped and/or suspected might happen.

The petition attempts to prove the promise by:

(1) Agent Richards' *denial* it existed,

(2) Sussman's admitted *hope or expectation* that he would "probably" get a lighter sentence.

(3) The Assistant United States Attorney's well-taken and court-sustained objection to a question which called for a witness' conclusion.

We hold no one or all of these matters prove an unlawful agreement with or promise to Sussman. And we hold there was no suppression of evidence by the Assistant United States Attorney on the record of this case.

Having determined that the district court erred in *one,* exceeding its jurisdiction in granting unauthorized relief; *two,* making insufficient findings to permit this court to ascertain upon what its conclusions were based; *three,* in holding the evidence in this case supported a finding that an improper agreement existed between the Assistant United States Attorney and the witness Sussman (based entirely on inference); *four,* in finding that the Assistant United States Attorney suppressed evidence (by making a valid objection to the form of a question, sustained by the trial court on that one ground), we hold the findings made are unsupported by the evidence.

Each judgment is reversed, and appellees ordered remanded to custody forthwith.

APPENDIX E.

Petition for Rehearing.

In the United States Court of Appeals for the Ninth Circuit.

United States of America, and Preston Smith, Warden of United States Correctional Institution at Terminal Island, California, Appellants. vs. Michele Marchese, Appellee. No. 19,172.

United States of America, and R. W. May, Warden of United States Correctional Institution at Terminal Island, California, Appellants. vs. Jesse Del Bono, Appellee. No. 19,249.

Appellees Michele Marchese and Jesse Del Bono petition the Court for a rehearing of its decision of February 10, 1965, reversing the judgment of the United States District Court in favor of Michele Marchese on September 30, 1963, and the judgment in favor of Del Bono on December 20, 1963; and pursuant to Rule 23 (5) of this Court, appellees respectfully suggest that the rehearing be *en banc*. Said petition and suggestions are made on the following grounds:

1. *This Court has misconstrued the meaning, purpose and effect of the decision of the Supreme Court in Marchese v. United States, 374 U.S. 101, in which it reversed this Court, rendering the following judgment:*

> "The petition for writ of certiorari is granted, the judgment is vacated and the case remanded to the United States District Court for the Southern District of California *for reconsideration in the light of Sanders v. United States, 373 U.S. 1.*" (Emphasis added.)

The Supreme Court had before it a summary of the evidence and the charges on the part of Marchese. We reiterate that, if the Supreme Court had not been of the opinion that the charges, if found to be true by the District Court, would constitute a violation of his constitutional rights, requiring the District Court to grant relief — which, in its discretion, it should decide was fair, equitable and proper — it would not have remanded the matter for "reconsideration." Otherwise, what would be the reason for "reconsideration"? The correct meaning of the decision was set forth in the Reply Brief of Marchese pages 4, 7, 8, 16, 17, 31, and 32.

2. *This Court also misconstrued the full meaning and effect of the Sanders case, supra, and has ignored pertinent and cogent language of the decision.*

The *Sanders* case goes far beyond the limitations placed thereon by this Court, and especially in its application to the present case. The doctrine of *res adjudicata* was held not applicable to *habeas corpus* or Section 2255, and successive petitions must be determined to be "conclusively without merit" in order to be denied. Controlling weight *may* be given to prior applications only on certain conditions, one of which was overlooked by this Court, namely, "(3) the ends of justice would not be served by reaching the merits of the subsequent application." (Marchese Br. pp. 30-31; Del Bono Br. pp. 9-10)

3. *This Court is in error in holding appellees herein may not use Section 2255 to relitigate questions raised or which should have been raised on appeal from judgment of conviction.*

Such rule is inapplicable where constitutional rights are involved (*Sanders v. United States, supra; Sunal v. Large,* 332 U.S. 174; Marchese Br. pp. 28-31; Del Bono Br. pp. 8-10). Since this Court on the first appeal affirmed the judgment of conviction without opinion, and since the denial of certiorari by the Supreme Court in said appeal meant neither approval nor disapproval of the judgment of this Court, there was no clear decision on the merits of the charges of violation of constitutional rights.

4. *This Court erred in several respects in holding that the relief granted by the District Court to appellees was beyond the authority and jurisdiction of that court.*

(a) The Court overlooked that, here, constitutional rights were violated and the judgment was subject to collateral attack, whereas in the cases cited there was no such violation. Under such circumstances the relief granted is not circumscribed by the 60-day period under *Rule 35 of Title 18 U.S.C., Federal Rules of Criminal Procedure.* (See:

> *Kinsella v. Looney,* 217 F. 2d 445, wherein the court stated that the District Court had jurisdiction to modify a 5-year sentence under §2255, even though more than 60 days had transpired.)

(b) The Court disregarded the decisions of *Powell v. Wiman,* 287 F. 2d 275 and *McKenna v. Ellis,* 280 F. 2d 593 (Marchese Br. pp. 22-27, 40), which held that, where there had been a violation of constitutional rights, the court may discharge the prisoner for time served.

(c) The petitions of both appellees were filed for *habeas corpus* under Title 28 §2243 U.S.C. as well as under §2255, so the District Court could grant relief under either section. (Marchese Br. 17, 20; Del Bono 14-16)

(d) The Court disregarded the language of the Supreme Court in the cases of *Sanders, supra; Hill v. United States,* 368 U.S. 424; *United States v. Hayman,* 342 U.S. 205, which held that §2255 provides:

> "In the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined."

(e) The Court ignored the double feature of the judgment which was discussed in the hearing in the District Court, namely, that the intent of Judge Clarke's decision was to "vacate and set aside the sentence and order the prisoner discharged for time served" in the interest of justice; but as an additional precaution to support his intent, at the request of counsel for Marchese, he reduced the sentence to five years so that appellees would be entitled in either event, due to good-time credits already earned, to be released forthwith. (Marchese Br. 18-20; Del Bono 14-16)

(f) The Court erred in holding that the District Court had no authority to discharge the appellees for time served.

(g) The Court missed the point and erred in holding that the District Court could not consider appellees' prison records and good-time credits already earned as provided under Title 18 §4161 U.S.C. in determining the appropriate relief it should grant. (Marchese 25-28; Del Bono 14-16)

5. *The Court erred in disregarding the violation of appellees' constitutional rights in the use of testimony obtained by the use of the Schmidt transmitter concealed on Sussman's person, and in that respect its decision is in conflict with the language of Lopez v. United States, 373 U. S. 427.*

6. *The Court transgressed the scope of appellate review in that it refused to accept the findings of the trial court based on substantial evidence, both direct and inferential, to support said findings, and erroneously substituted its independent judgment to resolve conflicts of facts, which is the sole province of the trial court.*

In reversing the judgment, the Court disregarded established and long-standing rules regarding the respective rights and duties of the appellate and trial courts, some of which are as follows:

(a) The trial court and not the appellate court is charged with the duty of weighing the evidence, determining the credibility of the witnesses, determining inferences and making findings of fact. (*Kincade v. Mikles,* 144 F. 2d 784; *Flynn v. United States,* 205 F. 2d 756.)

(b) Trial court's findings cannot be set aside unless "clearly erroneous" and due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. (*Title 28, Rule 52(a) U.S.C., Rules of Civil Procedure; Nishiskawa v. Dulles* (9th Cir.) 235 F. 2d 135.)

(c) Trial court may draw inferences favoring either party and unless "clearly erroneous" the findings and conclusions based thereon will not be disturbed on appeal. (*Walker v. United States,* 180 F. 2d 217; *Flynn v. United States,* 205 F. 2d 756; *Weyl-Zuckerman v. Comr. of Int. Rev.* (9th Cir.) 232 F. 2d 214.)

(d) Appellate court cannot substitute its own inferences, even if contrary inferences can be drawn, for those reasonably drawn by the trial court, even though it might disagree with those of the trial court. (*Widney v. U.S.,* 178 F. 2d 880; *Wunderlich v. U.S.,* 240 F. 2d 201, Cert. denied 353 U.S. 950.)

(e) Appellate court must take the view of the evidence most favorable to the prevailing party below and that party is entitled to all favorable inferences. (*Stacher v. U.S.* (9th Cir.) 248 F. 2d 112; *Cashman v. Mason* 166 F. 2d 693; *U.S. v. Comstock Extension Mining Co.,* 214 F. 2d 400.)

(f) Appellate court should adopt a version consonant with the findings, conclusions and judgment of the trial court. (*Elrick Rim Co. v. Reading, etc. Co.* (9th Cir.) 264 F. 2d ...., Cert. denied 360 U.S. 914.)

(g) Findings and conclusions of the trial court, if based on substantial evidence, will not be disturbed on appeal. (*Ellison v. Frank,* 245 F. 2d 837.)

(h) All intendments are in favor of upholding the judgment of the trial court and it is presumptively correct on all issues. (*Wick v. Keshner,* 244 F. 2d 146.)

(i) Even if the findings and conclusions are not complete, if they are sufficient to sustain the judgment, the appellate court should affirm the judgment without remanding for more specific findings or conclusions. (*Alger v. U.S.*, 171 F. 2d 667; *Weber v. McKee*, 215 F. 2d 447.)

7. *The Court erred in holding that the findings that perjury was committed by Sussman and Agent Richards was not supported by the evidence.* (Mar. Br. 33-43)

8. *The Court erred in holding that the finding that appellees were denied a fair trial in that the Asst. U.S. Attorney abused the privileges of his office in suppressing or failing to disclose the truth was without basis.* (Mar. Br. 37-43)

9. *The Court erred and abused its discretion by invading the province of the trial court in the latter's exercise of discretion in granting relief to appellees.*

Where judicial action involves the exercise of discretion, the exercise of such discretion in the manner determined by the District Court is final and may not be disturbed by the appellate court, except where there is a clear abuse of discretion. In this case, discretion was conferred on the District Court not only by the Supreme Court decision, *supra,* but also by Title 28 §2243 and §2255 U.S.C. as well as by a long line of decisions. There was here clearly no abuse of discretion by the District Court, and even this Court does not charge the District Court with an abuse of discretion. Hence, in overturning the exercise of such discretion by the District Court, this Court is manifestly in error.

The petition for rehearing should be granted and suggestions that rehearing be *en banc* should be accepted.

Respectfully submitted,
Burton Marks
Russell E. Parsons.

APPENDIX F.

On Petition for Rehearing.

In the United States Court of Appeals For the Ninth Circuit.

United States of America, and Preston Smith, Warden of United States Correctional Institution at Terminal Island, California, Appellants, vs. Michele Marchese, Appellee. No. 19,172.

United States of America, and R. W. May, Warden of United States Correctional Institution at Terminal Island, California, Appellants, vs. Jesse Del Bono, Appellee. No. 19,249.

Before: Barnes, Jertberg and Duniway, Circuit Judges.

The petition for rehearing is denied and the suggestion of a hearing *en banc* is rejected.

/s/ Stanley N. Barnes
/s/ Gilbert H. Jertberg
/s/ Ben. C. Duniway
United States Circuit Judges.

APPENDIX G.

Statutes Involved.

Title 28, Section 2241 (a) U.S.C.

Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

Title 28, Section 2244 U.S.C.

No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry. June 25, 1948, c. 646, 62 Stat. 965.

Title 28, Rule 52 (a) U.S.C. Federal Rules of Civil Procedure provides in part:

"* * * Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Constitution, Statutes and Regulations Involved Title 28, Section 2243, U.S.C.

"A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be issued, unless it appears from the application that the application that the applicant or person detained is not entitled thereto.

* * *

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

Title 28, Section 2255 U.S.C.

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion purstiant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139 Sec. 114,63 Stat.105."

Title 18, Rule 35, U.S.C. Rules of Criminal Procedure.

Correction or Reduction of Sentence.

The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Title 18, Section 4161, U.S.C.

Good Time Allowances. Computation Generally.

Each prisoner convicted of an offense against the United States and confined in a penal institution for a definite term other than for life, whose record of conduct shows he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows:

Eight days for each month, if the sentence is not less than five years and less than ten years.

Ten days for each month, if the sentence is ten years or more.

Title 18, Section 4163, U.S.C.

Except as hereinafter provided a prisoner shall be released at the expiration of his term of sentence less the time deducted for good conduct. * * *

Title 21, Section 174, U.S.C.

Whoever * * * receives, conceals, buy sells or in any manner facilitates the transportation, concealment, or sale of such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years, * * *.

Title 26, Section 4704 (a).

It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs except in the original stamped package or from the original stamped package * * *.

Title 26, Section 7237.

(a) Violation of law relating to opium and coca leaves and marijuana — Whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 (Includes Title 23 Sec. 4704 (a)) for which no specific penalty is otherwise provided, shall be fined not more than $2,000.00 and imprisoned not less than 2 or more than 5 years.

United States Constitution, Fourth Amendment.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States onstitution, Fifth Amendment.

No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

United States Constitution, Sixth Amendment.

In all criminal prosecutions, the accused shall have the right * * * to have the Assistance of Counsel for his defence.

Title 47, Section 605 U.S.C. (Federal Communication Act)

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof * * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same of any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *."

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 157

MICHELE MARCHESE, PETITIONER

v.

UNITED STATES OF AMERICA AND PRESTON SMITH, WARDEN OF THE UNITED STATES CORRECTIONAL INSTITUTION AT TERMINAL ISLAND, CALIFORNIA

JESSE DEL BONO, PETITIONER

v.

UNITED STATES OF AMERICA AND R. W. MAY, WARDEN OF THE UNITED STATES CORRECTIONAL INSTITUTION AT TERMINAL ISLAND, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (1 R. 4-35[1]; Pet. App. 6-46) is reported at 341 F. 2d 782.

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[1] The record is in ten volumes, to which we shall refer as "R." preceded by the volume number. Volumes 4-8, inclusive,

JURISDICTION

The judgments of the court of appeals were entered on February 10, 1965 (1 R. 36, 37). A petition for rehearing (Pet. App. 47–53) was denied on March 4, 1965 (1 R. 38; Pet. App. 54). The petition for a writ of certiorari was filed on May 19, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court had authority to reduce petitioners' sentences after the expiration of the 60-day period prescribed by Rule 35 of the Federal Rules of Criminal Procedure.

2. Whether the court of appeals properly reversed, as without substantial support in the record, the district court's conclusion that petitioners' convictions were procured by the prosecutor's suppression of relevant evidence.

3. Whether the court of appeals' disposition of petitioners' appeals was inconsistent with this Court's mandate on remand.

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contain the reporter's transcript of the original criminal trial, at which petitioners were co-defendants. Volumes 2 and 3 consist of the clerk's transcript and the reporter's transcript, respectively, of the proceedings in the district court relating to petitioner Marchese's collateral attack on his conviction (denominated a petition for a writ of habeas corpus, but treated throughout as in substance a (second) motion to vacate sentence under 28 U.S.C. 2255). Volumes 9 and 10 are the clerk's and reporter's transcripts, respectively, of the district court proceedings on petitioner Del Bono's motion to vacate his conviction under 28 U.S.C. 2255. Volume 1 contains the consolidated proceedings in the court of appeals.

STATEMENT

In 1958, following a joint trial in the United States District Court for the Southern District of California, petitioners were convicted of offenses against the narcotics laws, and each was sentenced to ten years' imprisonment. In 1959, the convictions were affirmed, *Marchese* v. *United States,* 264 F. 2d 892, and petitions for writs of certiorari denied, 360 U.S. 930. In 1960, a motion by petitioner Marchese, under 28 U.S.C. 2255, to vacate his conviction was denied by the district court, from which order no appeal was taken. In 1961, a petition by Marchese for a writ of habeas corpus, which has been treated in these proceedings as in substance a second motion to vacate under 28 U.S.C. 2255,[3] was denied, and the court of appeals, in 1962, affirmed. *Marchese* v. *United States,* 304 F. 2d 154. On June 10, 1963, this Court vacated the court of appeals' judgment and remanded the case to the district court "for reconsideration in light of *Sanders* v. *United States,* 373 U.S. 1." *Marchese* v. *United States,* 374 U.S. 101. On September 30, 1963, following an evidentiary hearing, the district court entered an order (1) reducing Marchese's sentence to five years and directing his immediate release (2 R. 181–182; Pet. App. 1–2), and (2) ruling that Marchese had been denied a fair trial by reason of the prosecutor's failure to disclose relevant evidence to the court and jury (Pet. App. 23, 25, 28). On December 20, 1963, the same court, in a proceeding under 28 U.S.C. 2255 brought by petitioner Del Bono, entered a like order as to that petitioner (9 R. 42-43; Pet. App. 3-4). On consolidated appeals by the government, the court of appeals reversed these orders and directed that both petitioners be remanded to custody (1 R. 36, 37).

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[3] The institution in which Marchese was then confined (the United States Correctional Institution at Terminal Island, California) is located in the same district in which petitioners' trial occurred (2 R. 2–3, 178). (He was later transferred to the United States Penitentiary at Leavenworth, Kansas (2 R. 99).)

The relevant facts are as follows:

1. The indictment charged petitioners, in one count, with conspiring to violate the narcotics laws, and, in nine counts, with making three illegal sales of heroin—on January 30, February 7, and March 13, 1958 (7 R. 542-549). Marchese was convicted on all counts, Del Bono on the conspiracy count and the counts relating to the March 13 sale (8 R. 753-754).[3] Each was sentenced to ten years' imprisonment on each of the counts on which he was convicted, the terms to run concurrently (8 R. 776, 779).

The evidence adduced at the trial (see the government's brief in opposition to certiorari, Nos. 922 and 898 Misc., Oct. Term, 1958, pp. 4-7) showed that petitioner Marchese, on the three dates alleged in the indictment (January 30, February 7, and March 13, 1958), sold heroin to Donald Sussman, a user of narcotics, who, during this period, was acting as a government informer. Sussman had been selling drugs on consignment for Marchese for some four years previously and had been arrested shortly before January

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[3] Del Bono was acquitted on the substantive counts relating to the other two sales (8 R. 754).

30. During the next six weeks he cooperated with government officers in a joint federal-state investigation of Marchese's narcotics activities. The government's proof consisted in part of incriminating statements made to Sussman by Marchese in the apartment of a Miss Nichols, where petitioner also lived. These statements had been overheard by two of the officers through the use of a radio transmitter concealed on Sussman's person. Other evidence consisted of statements made by Marchese to Sussman over the telephone, which one of the officers overheard by placing his ear next to the receiver with Sussman's permission.

The March 13 sale related to a two-pound consignment of heroin, valued at $11,500. Petitioner Del Bono was seen by the narcotics officers placing a bag containing the narcotics in the trunk of a 1941 Dodge automobile, which Marchese had told Sussman would be found (with the narcotics in it) at a specified time and at a specified street corner in Los Angeles. Del Bono was seen driving the car to this location at this approximate time, parking it, and a moment later being driven from the scene by Marchese in another automobile. Sussman, pursuant to his arrangement with Marchese, removed the heroin from the trunk of the parked car and immediately turned it over to the narcotics agents, who had witnessed the entire transaction (4 R. 61, 77–78; 5 R. 168–169, 176–177; 6 R. 256, 306–308).

Through the normal processes of examination and cross-examination of witnesses (principally Sussman and Malcolm Richards, the federal narcotics agent in charge of the investigation), it was brought out at the trial that Sussman had been arrested by the federal agents for a narcotics offense on January 29, 1958, the day preceding the commencement of his cooperative activities on behalf of the federal and State agents (4 R. 18–19, 62; 6 R. 360); that a year and a half previously he had been convicted in a California State court of another narcotics offense, for which he was on probation at the time of his federal arrest (5 R. 94–95; 7 R. 432–433); that following his federal arrest he was taken to the offices of the Narcotics Bureau in Los Angeles, where agent Richards had a conversation with him in the presence of other federal agents and representatives of the State narcotics authorities (4 R. 18); that Sussman knew at that time that if he cooperated with the authorities in their investigation of other persons he would "probably" get a lighter sentence in his own case, and that he decided to cooperate with the agents in the hope and for the purpose of getting a lighter sentence (7 R. 419, 434–435); that following his conversation with the agents he was taken before a federal committing magistrate and released on his own recognizance (4 R. 19; 5 R. 95); that during the ensuing period of approximately six weeks, in which he cooperated with State and federal authorities in gathering evidence against petitioners, he received periodic payments totaling approximately $600 from a government fund established for such purposes, in order to support himself and his family (4 R. 83–86; 5 R. 108; 7 R. 435–436); that during the period of his cooperative efforts he continued his personal use of narcotics, using for this purpose a supply he had accumulated prior to his arrest (4 R. 72; 5 R. 96; 7 R. 411-412, 436-437); that on March 26, 1958—between the date of petitioners' arrest and the commencement of their trial—he pleaded guilty before Judge Byrne, another judge of the court in which petitioners were on trial, to a narcotics charge arising out of his federal arrest, and was sentenced to two years' imprisonment (5 R. 95, 97, 99; 7 R. 450); that Judge Byrne recommended, at the time he imposed sentence, that Sussman be sent to a hospital for treatment of his narcotics addiction (5 R. 97); and that, pursuant to this recommendation, he was sent to the United States Public Health Service Hospital in Fort Worth, Texas—from which institution he was brought to Los Angeles to testify at petitioners' trial (7 R. 412, 450-541).

Agent Richards was asked on cross-examination whether he had made "some kind of an agreement with" Sussman during their conversation at the Narcotics Bureau offices. The prosecutor, Assistant United States Attorney Bruce Bevan, objected to the question on the sole ground that it "call[ed] for a conclusion of the witness," but made it clear that he had "no objection to the facts coming out." The objection was sustained and the matter was not further pursued (4 R. 62-63). Subsequently in the course of his cross-examination, Richards testified that Sussman had not been told by him, or by anyone in his presence, that he "would receive a lighter sentence" for his federal offense if he would cooperate with the agents in gathering evidence against Marchese (5 R. 107).[4]

Under redirect examination by the prosecutor, Richards was asked whether he had ever had a conversation regarding Sussman with Sussman's State probation officer following Sussman's federal arrest and the commencement of his cooperative activities. Counsel for Marchese objected. The court, after initially sustaining the objection, permitted the witness to answer "yes or no" when the prosecutor pointed out that he had not asked for the content of the conversation. Richards answered that he had had such a conversation. The prosecutor then asked Richards if he knew whether the probation officer had spoken regarding Sussman to the Superior Court judge who had sat in Sussman's State case. Counsel for Marchese objected to the question on the ground that the matter which the prosecutor was attempting to bring out was "completely immaterial." The objection was sustained (5 R. 111-112).

Later in his redirect examination of Richards, the prosecutor, directing Richards' attention to the fact that he had stated on cross-examination that Sussman had not been told in Richards' presence that he would receive a lighter sentence for his federal offense if he cooperated, asked whether he had had any conversation with Sussman to the effect that "the United States Attorney would be contacted to determine what type of counts would be filed against him in the event his assistance was rendered." Counsel for Marchese objected to this question also—on the ground that it was "leading and suggestive" and involved "improper redirect examination." The objection was sustained (5 R. 112–113).

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[4] This statement of Richards' is the principal testimony claimed by petitioners to have been perjurious. See *infra*, pp. 19-21.

2. The grounds of petitioners' direct appeals from their convictions were (1) that the use of evidence obtained by the agent's "interception" of telephone messages between Marchese and Sussman was forbidden by 47 U.S.C. 605 (the anti-"wiretap" provision of the Communications Act of 1934), (2) that the evidence was insufficient to support the verdicts, (3) that petitioners h[illegible] been entrapped into committing their offenses, and (4) that the use of the radio transmitter concealed on Sussman's person violated the accused's constitutional rights (2 R. 94–96; Pet. App. 18–19). The convictions, as previously noted, were affirmed on appeal, and petitions for writs of certiorari were denied, 264 F. 2d 892; 360 U.S. 930.

3. On November 16, 1960, petitioner Marchese filed in the district court a motion to vacate his conviction under 28 U.S.C. 2255—urging, among other grounds, that the trial had been unfair because of "misconduct of the prosecutor" in presenting "unreliable and inadmissible evidence" (2 R. 97–98). The motion was denied without hearing, and a motion for reconsideration was denied, no appeal being taken from either judgment (2 R. 4, 98). On June 20, 1961, Marchese filed the petition for a writ of habeas corpus which gave rise to the instant proceedings (2 R. 2–47). The

petition enumerated six "points and grounds" for granting the relief sought (2 R. 13–14). The third of these—the only one requiring detailed mention at this time [5]—was that the prosecutor had "actively participat[ed] in the suppression of the truth" and "fail[ed] to disclose the truth" concerning "the obvious agreement * * * between Donald Sussman and the Federal and State authorities" (2 R. 13).

On June 29, 1961, the petition was denied without a hearing (2 R. 54), and on May 31, 1962, the court of appeals affirmed. *Marchese* v. *United States,* 304 F. 2d 154. Treating the petition as a second motion to vacate under 28 U.S.C. 2255, the court held that it was defective on its face for the reason (among others) that it failed to explain why the allegedly new grounds relied on could not have been asserted in the earlier proceedings or to allege that the petitioner had been previously unaware of the significance of the relevant facts. 304 F. 2d at 156–157. For this aspect of its holding, the court cited its prior decision in *Sanders* v. *United States,* 297 F. 2d 735, which was subsequently reversed by this Court in *Sanders* v. *United States,* 373 U.S. 1. On June 10, 1963, this Court vacated the court of appeals' judgment and remanded the case to the district court "for reconsideration in light of *Sanders* v. *United States,* 373 U.S. 1." *Marchese* v. *United States,* 374 U.S. 101.

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[5] Ground 1—that "the use of 'silver platter' evidence" at the trial deprived the accused of due process of law (2 R. 13, 14–16)—was based on a misconception of the so-called "silver platter" doctrine (see *Elkins* v. *United States*, 364 U.S. 206, and *Rios* v. *United States*, 364 U.S. 253); and was subsequently formally abandoned (Reply Brief of Appellee Michele Marchese, No. 19172, C.A. 9, p. 33).

Grounds 2, 4, and 6 involved, respectively, renewal of the previously-urged contentions relating to entrapment, the use at the trial of evidence derived from the concealed radio transmitter, and the evidence based on the "intercepted" telephone messages (2 R. 13, 14, 17–20, 25–35, 40–43).

Ground 5 challenged the legality of Marchese's arrest and of the alleged "search" of Del Bono's automobile (2 R. 13, 36–40). It presented no issue properly cognizable on collateral attack and was furthermore unsound on its merits. See *infra*, pp. 23–24, including note 18.

4. On September 4 and 9, 1963, an evidentiary hearing on Marchese's petition was held in the district court before Judge Thurmond Clarke, the presiding judge at petitioners' trial (3 R. 1–70). The court records, federal and State, relating to the disposition of the narcotics charges against Sussman were received in evidence (3 R. 17–21, 65, 68–70). These showed that on March 26, 1958, Sussman pleaded guilty before Judge Byrne to an information charging a violation of 26 U.S.C. 4704(a) and 7237, for which he was sentenced to two years' imprisonment with the recommendation that he be hospitalized for his addiction (3 R. 65, 68–69), and that on April 30, 1958, the California Superior Court for Los Angeles County revoked Sussman's probation for his State narcotics offense and sentenced him to a year's imprisonment to run concurrently with his federal sentence (3 R. 17–18). The State court's action—except as to the length of the sentence imposed—was pursuant to a recommendation of the court's probation officer, Karl Holton (3 R. 19–20).

Agent Richards testified at the hearing that he told Sussman, following the latter's federal arrest, that anything Sussman might do to cooperate with government authorities in bringing about the arrest and conviction of his "source of supply" (Marchese) would be brought to the attention of the United States Attorney, that it would be up to that officer to "go along from there," and that he (Richards) "couldn't promise [Sussman] anything" (3 R. 13). Richards further testified that Sussman told him at that time about his pending State proceeding for a narcotics offense and that he (Richards) advised Sussman that if the latter would cooperate he would speak to the State officers on Sussman's behalf (*ibid.*). Richards thereafter did speak to Sussman's probation officer (Mr. Holton) and "put the facts before him"—*i.e.,* he informed Holton that Sussman had consented to cooperate in the investigation of Marchese (3 R. 13–14, 35, 36–37). Richards also testified that some time prior to the imposition by Judge Byrne of Sussman's two-year federal sentence Richards informed the probation officer attached to the federal court that Sussman was cooperating with the government authorities (3 R. 22–23). The witness also again testified, as he had testified at the trial, that he at no time promised Sussman that he would get a lighter sentence for his federal crime if he would cooperate (3 R. 24).

Mr. Bevan, the prosecutor, testified that he drew the federal information to which Sussman pleaded guilty before Judge Byrne; that the charge (commonly called a "tax count") was for a less serious offense than Sussman could have been prosecuted for on the basis of the available evidence; that he (Bevan) had no intention of suppressing evidence at petitioners' trial; and that, to his best knowledge, all prosecution witnesses had testified truthfully (3 R. 60–62, 65–66).

5. On September 30, 1963, the district court entered the following judgment: It ordered that Marchese's sentence of ten years' imprisonment on each count, to run concurrently, be "modified, reduced and corrected" to five years on each count, to run concurrently, and, it appearing that he had served more than four years of his sentence and had earned sufficient good-time credit while in prison to make his immediate release appropriate, that Marchese be forthwith released from custody (2 R. 181–182). The court contemporaneously ruled (inconsistently) that "the constitutional rights of [Marchese] to a fair trial were denied and so infringed upon as to render the judgment subject to collateral attack" (2 R. 179). Findings of fact and conclusions of law, drafted by Marchese's counsel and adopted by the court in the form submitted (3 R. 78–79, 130–132), were entered (2 R. 172–179).[6] These findings and conclusions—except for Finding of Fact XII and Conclusion of

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[6] During the colloquy between court and counsel, before the entry of the formal order, findings, and conclusions, government counsel repeatedly asked the court to state on what ground or grounds it considered Marchese's conviction vulnerable to collateral attack, but was unsuccessful in eliciting an answer (3 R. 77, 78, 81–82, 93–94, 95–96, 124, 125, 129). See the opinion below at Pet. App. 20.

Law I[7]—are set forth in full in the opinion of the court of appeals (Pet. App. 21–28) and need not be repeated here. Briefly summarized—insofar as they relate to the alleged suppression of evidence by the prosecutor—the findings were as follows: that, although agent Richards denied at the trial that he had made any promise to Sussman to "try to obtain some consideration for" the latter if he would cooperate in bringing about the arrest and conviction of Marchese, "some such promise, arrangement or assurance" was made (Finding of Fact I, Pet. App. 21–22); that when Sussman testified on cross-examination that he knew he would "probably" get a lighter sentence for his federal offense if he cooperated with the narcotics agents, he "had already been granted great leniency, both by the Government and the Superior Court of the County of Los Angeles," and the prosecuting attorney "should then have disclosed to the court and jury what had been done for" Sussman (Findings IV and V, Pet. App. 22–23);[8] that the prosecutor, "by a technical objection," "prevented disclosure of any arrangement between Sussman and Agent Richards"[9]

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[7] Finding of Fact XII was that Marchese had served approximately four years and four months of his ten-year sentence and that under the rules of the Bureau of Prisons he had earned sufficient good time to entitle him to be released if his sentence was reduced to five years (2 R. 178). Conclusion of Law I (*ibid.*) has no present relevance. It appears at page 2, note 2, of the petition for a writ of certiorari.

[8] The acts of "leniency" referred to were summarized in Findings II and III, Pet. App. 22.

[9] This finding referred to the prosecutor's objection to the question of defense counsel as to whether Richards had made "some kind of an agreement with" Sussman—on the ground that the question called for a conclusion of the witness (*supra*, p. 7).

(Finding VI, first paragraph, Pet. App. 23); and that the failure of the prosecutor to disclose to the court and jury the disposition which had been made of Sussman's State and federal cases "denied [Marchese] the fair trial to which he was entitled" (Finding VI, last paragraph, Pet. App. 25).

6. On November 12, 1963, petitioner Del Bono filed in the district court a motion under 28 U.S.C. 2255 to vacate his conviction (9 R. 2–18). The motion, his fourth under that section (see 9 R. 4, 24–25),[10] invoked two of the six "points and grounds" on which Marchese's petition for a writ of habeas corpus was predicated (see *supra*, pp. 9–10). The first of these—the only one now relevant[11]—was the same as Marchese's third ground, *viz.*, that the prosecutor had suppressed relevant evidence at the trial (9 R. 10–13). At a hearing (10 R. 1–54)—also held before Judge Clarke—it was stipulated that all of the evidence received at the hearing on Marchese's petition would be considered also for the purposes of Del Bono's (10 R. 22–24). On December 20, 1963, the court made findings of fact and conclusions of law (9 R. 34–41), and entered a judgment (9 R. 42–43), which, with immaterial variations, were identical with the findings, conclusions, and judgment entered as to Marchese.

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[10] No appeals were taken from the prior orders of denial (9 R. 25).

[11] Del Bono's second ground—the same as Marchese's fourth (see note 5, *supra*, p. 10)—related to the use at the trial of evidence derived from the concealed radio transmitter attached to Sussman's person during certain of Sussman's conversations with Marchese (9 R. 13–16). The latter issue, as noted at page 9, *supra*, was one of the issues litigated on petitioners' direct appeals from their convictions.

7. On appeal by the government from each of these judgments, the court of appeals, in consolidated proceedings, reversed both orders, directed that petitioners' ten-year sentences be reinstated, and remanded the prisoners to custody (Pet. App. 6–46). The court held (1) that the district court had exceeded its powers in reducing petitioners' sentences long after the expiration of the period prescribed for the taking of such action by Rule 35 of the Federal Rules of Criminal Procedure (60 days after the imposition of sentence, its affirmance on appeal, or the denial of an application for a writ of certiorari) (Pet. App. 15–17);[12] and (2) that the district court's determination that petitioners' convictions were vulnerable to collateral attack was without substantial support in the record (Pet. App. 18–46). With respect to the latter aspect of its decision, the court held that 28 U.S.C. 2255 may not be used to litigate issues which were or should have been raised on an accused's direct appeal from his conviction (Pet. App. 18); that the only issue presented in the Section 2255 proceedings which under that criterion was cognizable under that section was the alleged suppression of evidence and knowing use of perjured testimony by the prosecuting attorney (Pet. App. 18–21); and that there was no evidence in

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[12] The court also held—incidentally to this aspect of its decision—that even if the district court's action in reducing petitioners' sentences had been valid (thus making relevant the statutory provisions relating to good-time credits and allowances) it is the business of the prison authorities, not the courts, to administer these provisions in the first instance. Only if there has been arbitrary action or abuse of authority on the part of the prison authorities in the discharge of their relevant responsibilities, the court held, does it become the function of the courts to intervene (Pet. App. 17–18).

the record from which the district court could reasonably have concluded that this charge had substance (Pet. App. 21–46).

ARGUMENT

1. The court of appeals was manifestly right in holding that the district court exceeded its authority in reducing petitioners' sentences. Rule 35 of the Federal Rules of Criminal Procedure authorizes a sentence to be reduced "within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari," and Rule 45(b) specifically forbids enlargement of this period. It is plain, therefore, that the time limit fixed by the rule is inflexible and jurisdictional—as this Court itself has observed. *United States* v. *Robinson,* 361 U.S. 220, 224–226. And see *United States* v. *Hunter,* 162 F. 2d 644, 647–648 (C.A. 7) (cited with approval in *Robinson, supra,* at 226), so holding. It is undisputed that the 60-day period referred to had long since expired when the district court acted. Nothing in 28 U.S.C. 2255 authorizes a court to reduce a sentence. That section deals exclusively with motions to set aside or correct illegal sentences. It has no relevance to a motion to shorten a legal one. *Jenkins* v. *United States,* 325 F. 2d 942, 945–946 (C.A. 3); *Richards* v. *United States,* 212 F. 2d 453, 454 (C.A.D.C.).[13]

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[13] A *dictum* in *Kinsella* v. *Looney,* 217 F. 2d 445 (C.A. 10), relied on at Pet. 12, 33–34, to the effect that the trial court had jurisdiction under 28 U.S.C. 2255 to reduce the sentence there involved, although more than 60 days had transpired

2. The court of appeals was also correct in holding that the determination by the district court that petitioners' convictions were vulnerable to collateral attack was without substantial support in the record. The gravamen of petitioners' contentions on this issue—in this Court as in the courts below (Pet. 10–11, 16, 17–20; 2 R. 21–23; and see *supra*, pp. 10, 14–15)—is that agent Richards and the informer, Sussman, "committed perjury with respect to any promises or agreements as to leniency for Sussman if he cooperated with federal agents" (Pet. 16); that this perjury was knowingly used by the prosecutor (Pet. 11, 17); and that the prosecutor, by a "technical objection," suppressed and concealed the relevant truth (*ibid.*). No evidence supports any of these charges. Not only is there no evidence that tainted testimony was wittingly used; there is not the slightest indication that any perjurious testimony—whether known or unknown to the prosecutor—was given. And the record flatly refutes the claim that the prosecutor suppressed or concealed any pertinent fact.

a. The claim that the prosecutor suppressed evidence by a "technical objection" is squarely contradicted by the record. The pertinent incident is described at page 7, *supra*. To the question, asked of agent Richards on cross-examination, whether he had

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since its imposition, is supported by no other authority, to our knowledge, and none was cited. The court's statement had no relevance to the issue before it—whether two cumulative one-year terms of imprisonment (the sentence as reduced) were supportable by the counts on which they were based. So far as appears, the reduction of the sentence more than 60 days after its imposition had not been opposed.

made "some kind of an agreement" with Sussman during their conversation at the Narcotics Bureau offices following Sussman's arrest, the prosecutor objected on the ground that it "call[ed] for a conclusion of the witness." He made it explicitly clear, however, that he had "no objection to the facts coming out." Indeed, the prosecutor himself attempted to elicit from this witness, on redirect examination, the relevant background "facts," *and was prevented from doing so by defense objections* (*infra*, pp. 20–21).

b. The principal testimony said to have been perjured (Pet. 11) was agent Richards' testimony on cross-examination that neither he nor anyone in his presence had told Sussman that Sussman "would receive a lighter sentence" in the criminal proceeding pending against him if he would cooperate with the agents (5 R. 107).[14] There is not the slightest indication that this testimony was false. Richards did tell Sussman—as he readily acknowledged at the hearing in the collateral proceedings (*supra*, p. 12)—that anything Sussman might do to cooperate with the agents in bringing about the arrest and conviction of his "source of supply" (Marchese) would be brought to the attention of the United States Attorney. But Richards did not deny at the trial that he had made that promise to Sussman.[15] His pertinent testimony was a negative response to a specific question—whether Sussman had been promised "a lighter sentence."

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[14] The sole additional testimony claimed to be untrue was Sussman's testimony on cross-examination that he knew he would "probably" get a lighter sentence for his federal offense if he was cooperative (Pet. 10–11; *supra*, p. 6). The theory on which it is contended that this testimony was false is, apparently, that Sussman thereby impliedly denied that there had been an *actual* "bargain" between himself and the agents under which he "would receive" a lighter sentence in return for his cooperation; the contention assumes the existence of the "bargain" (see 2 R. 23). In short, the claim that Sussman perjured himself assumes that Richards testified falsely in denying that any such promise had been made.

The insubstantiality of the charge of perjury by Richards—and particularly of the claim that the prosecutor sought to suppress evidence—is shown by the fact that the prosecutor, in his redirect examination of this witness, after directing his attention to his denial that Sussman had been told in his presence that he would receive a lighter sentence if he cooperated, asked whether Richards had had any conversation with Sussman to the effect that "the United States Attorney would be contacted to determine what type of counts would be filed against him" if he cooperated. The prosecutor's effort to elicit the facts in this regard—which are the very facts which petitioners now characterize as "suppressed"—were blocked by a defense objection, sustained by the court (*supra*, pp. 8–9). Again, at another point in his redirect examination of Richards, the prosecutor sought to elicit the circumstances surrounding the witness' approach to Sussman's State probation officer, on Sussman's behalf, after Sussman had agreed to assist the agents in their further investigations. (This incident related to another of the instances of considerate treatment of Sussman which petitioners later charged the prosecutor with having unfairly suppressed.) Richards—as he readily acknowledged in the collateral proceedings—had told Sussman at the time of his arrest that he would speak to his State probation officer on his behalf if he would agree to cooperate, and the agent did in fact subsequently do so, explaining to the officer that Sussman had agreed to assist the narcotics agents (*supra,* pp. 8–9, 12). At the trial, the prosecutor sought to develop, through Richards, the circumstances surrounding this episode. He was prevented from doing so, however—again by defense objections (the defense contended that the matter was "completely immaterial"). The most that the prosecutor was able to bring out was that Richards and the probation officer had in fact had such a conversation (*supra,* p. 8).

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[15] For this reason, the district court's finding that Richards denied making "*any such* promise, arrangement or assurance" (referring to "some form of promise" by Richards that he "would try to obtain some consideration for" Sussman if the latter would agree to cooperate) (Finding I, Pet. App. 21 (emphasis added); see *supra*, p. 14) is wholly without record support. By the same token, the court's vague correlative finding that "*some such* promise, arrangement or assurance was in fact made" by Richards (*id.*, Pet. App. 21–22 (emphasis added)) is wholly without relevance.

c. Sussman's background, and his motives for cooperating with the authorities and testifying for the government at petitioners' trial, were brought out in great detail at the trial through the usual process of examination and cross-examination. Among other things, the fact that Sussman had a federal criminal case pending against him at the time he consented to cooperate, his probationary status under a prior State narcotics conviction, his release on his own recognizance after agreeing to assist the authorities, his personal addiction to narcotics, his receipt of government funds during the period of his cooperative activities, his eventual plea of guilty to the federal charges, and the lenient sentence imposed on those charges were all fully developed at the trial (*supra*, pp. 5–7). Obviously it was within the power of petitioners' trial attorneys to develop further facets of these background matters had they wished to do so. The simple fact is that they had no such desire.[16]

3. There is no merit to petitioners' claims that the court of appeals' decision is inconsistent with this Court's remand in *Marchese* v. *United States*, 374 U.S. 101, or with the decision in *Sanders* v. *United States*, 373 U.S. 1. All that the *Sanders* decision and the remand of the *Marchese* case required was that the courts below consider on the merits those claims which had not previously been made (so long as they were not deliberately withheld by petitioners) and repetitious claims to the extent that the ends of justice required their consideration. In the present case, subject to a qualification to be mentioned, the court of appeals passed—after a full hearing in the district court—on the challenges to petitioners' convictions which had not previously been asserted and refused

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[16] The reason for counsel's disinterest in this regard is not difficult to understand. Despite the stress which has been laid by petitioners' later attorneys (in the collateral proceedings) on the importance of the factors which moved Sussman to assume the informer's role, the fact is that these factors were of no great moment at the trial. For the key points in Sussman's testimony were fully corroborated by the testimony of the State and federal officers, who kept Sussman constantly under surveillance as he helped them gather the incriminating evidence. Moreover, Sussman's motives for cooperating and for testifying on the government's behalf were clearly understood by everyone at the trial.

to consider those which had been litigated on direct appeal. Petitioners suggested to the court no sound reasons to believe that the "ends of justice" warranted reconsideration of the latter. The claims that petitioners were "ensnare[d]" (Pet. 7, 16), that the evidence obtained through use of the concealed radio transmitter was inadmissible because illegally procured (Pet. 20–23), that agent Richards' "interception" of telephone messages between Marchese and Sussman was unlawful (Pet. 24–25), and that the officers' search without warrant of Marchese's person and apartment and a like search of an automobile of Del Bono's violated the accused's Fourth Amendment rights (Pet. 23)—were, with one exception, all fully litigated on petitioners' direct appeals from their convictions (*supra*, p. 9). The court of appeals was clearly right, therefore, in holding that petitioners had no right to relitigate these issues in collateral proceedings under 28 U.S.C. 2255 (Pet. App. 18–20). See, *e.g., Medrano* v. *United States*, 315 F. 2d 361, 362 (C.A. 9), certiorari denied, 375 U.S. 854.[17]

The exception—the claim that certain searches were illegal—involved, at most, a question of trial error in the admission of evidence. It presented nothing cognizable in collateral proceedings. As observed in *Davis* v. *United States*, 214 F. 2d 594, 596 (C.A. 7), certiorari denied, 353 U.S. 960, "a motion for vacation of a judgment and sentence under 28 U.S.C.

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[17] The fact that the court of appeals, on the direct appeal, affirmed the convictions without opinion (264 F. 2d 892) obviously does not mean—as petitioners argue (Pet. 34)—that the court "did not pass upon" the issues raised in the appeal.

§ 2255 cannot be used in lieu of an appeal to correct errors committed in the course of a trial, even though such errors relate to constitutional rights * * *." The admission of evidence alleged to have been unlawfully seized may not be made the basis of a collateral attack on a conviction. *Warren* v. *United States*, 311 F. 2d 673, 675–676 (C.A. 8); *Williams* v. *United States*, 307 F. 2d 366, 367 (C.A. 9); *United States* v. *Scales*, 249 F. 2d 368, 370 (C.A. 7), certiorari denied, 356 U.S. 945; *Davis* v. *United States*, 214 F. 2d 594, 596 (C.A. 7), certiorari denied, 353 U.S. 960; *United States* v. *Walker*, 197 F. 2d 287, 288 (C.A. 2), certiorari denied, 344 U.S. 877.[18]

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[18] There is at all events no substance to this contention. The only "search" which yielded evidence was, as the petition acknowledges (Pet. 23), the alleged search of Del Bono's automobile. The pertinent incident—Sussman's removal of narcotics from the trunk of this vehicle pursuant to his arrangement with Marchese and at the latter's direction (*supra*, p. 5)—involved no search at all in any ordinary sense, even though Sussman was acting at the time in his capacity as a "special employee" of the Narcotics Bureau, and promptly delivered the narcotics to the officers. Moreover, Del Bono, who under any hypothesis would alone have had standing to complain of this incident (cf. *Jones* v. *United States*, 362 U.S. 257, 261), did not raise this issue in the collateral proceedings (*supra*, pp. 10, 15, including notes 5 and 11).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1965
No. 157

MICHELE MARCHESE,
Petitioner,
vs.
UNITED STATES OF AMERICA, PRESTON SMITH, Warden of United States Correctional Institution at Terminal Island, California,
Respondents.

JESSE DEL BONO,
Petitioner,
vs.
UNITED STATES OF AMERICA, R. W. MAY, Warden of United States Correctional Institution at Terminal Island, California,
Respondents.

REPLY OF PETITIONERS TO RESPONDENTS' OPPOSITION BRIEF.

Preliminary Statement.

Most of the matters covered by the somewhat lengthy brief by the Government,[1] in opposition to the Petition for Certiorari have been covered by the petition, so we shall in this reply confine ourselves to a brief amplification of the points raised in the petition and the correction of, and argument against, points raised in the respondents' opposition brief.

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[1] In this brief the respondents' opposition brief will be referred to by the initials "G.B."; the petition for certiorari as "Pet."; the petition of Marchese for habeas corpus as "M.H.C."; the original petition of Marchese for certiorari in which the Supreme Court granted certiorari, vacated the judgment and remanded the case to the district court for reconsideration as "O.M. Pet."; the Government's brief in opposition thereto as "O.G.B."; Marchese's reply thereto as "O.M.B."; the reporter's transcript of the trial as "T.R.T."; the reporters' transcript at the hearing as "R.T."; and the clerk's transcript as "C.T.".

We wish, however, to call the attention of this Court to the fact that most of the contentions raised by the Government were also raised by its brief in opposition to the Petition for Certiorari filed by Michele Marchese in the October, 1962, term No. 362 in which this Court granted certiorari, vacated the judgment and remanded the case to the Federal Court "for reconsideration in the light of *Sanders v. United States,* 373 U.S. 1 (374 U.S. 101)." Since most of the points raised in the instant proceeding were adversely decided against the Government, it is bound by such decision. Consequently, we respectfully refer this Court to the petition and briefs filed by the parties in that proceeding.

We disagree with the Government as to its statement of the questions presented (G. B. p. 2). We submit that in the petition the questions presented are more adequately set forth (Pet. pp. 7-8).

Reply to Respondents' Statement.

In its statement of the questions presented (G. B. p. 3-4) the Government makes the assertion that the petition of Marchese for a writ of habeas corpus has been treated in these proceedings as, in substance, a second motion under Title 28 U.S.C. 2255 and that the proceeding brought by Del Bono was under the same section. These assertions are not strictly correct. Marchese's petition for habeas corpus could be treated interchangeably under habeas corpus and the motion procedure. If Sec. 2255 should be determined to be inadequate or ineffective to afford and support the relief granted, the petition should be treated as one for *habeas corpus*. The same is true with respect to Del Bono, since his proceeding was also in the alternative of the motion procedure and *habeas corpus*.

The respondents also are incorrect in their statement (G. B. p. 3-4) that the District Court ruled that "Marchese had been denied a fair trial by reason of the prosecutor's failure to disclose relevant evidence to the Court and jury." An examination of the findings and conclusions of the Trial Court shows clearly that it ordered the petitioner discharged due to the violation of his constitutional rights not only by reason of the failure of the prosecution to disclose relevant evidence, but for other reasons also, to wit:

(a) Use of perjured testimony by Government witnesses.

(b) Type of tactics used by Federal officers to bring about the arrest and conviction of Marchese in order to "get" him, including the consent to and condonation of the violation by Sussman of the narcotics laws of the United States during the investigation.

(c) Use of the transmitting device, known as the Schmidt transmitter, concealed on the person of Sussman, whereby the Government agents outside Marchese's apartment overheard, and over objection of petitioners, were permitted to testify concerning conversations between Sussman and Marchese in the latter's apartment.

(d) Arrest of petitioners, and the search of Marchese's apartment and Del Bono's auto without a warrant of arrest or search warrant, although there was ample time to obtain such warrants.

(e) In addition to and because of the above, the District Court determined it would serve the ends of justice to discharge the petitioners on account of their excellent prison records.

As we have pointed out in the petition, the intent of the District Court was to vacate the judgment of conviction and to discharge petitioners for the time served in prison by them amounting to approximately 4½ years, and that the reduction of their sentence to five years was incidental to, and for the purpose of supporting and fortifying, the order of discharge.

The only evidence that Marchese sold drugs to Sussman for four years prior to his arrest was the unsupported statements of Sussman, who was a drug addict and unreliable as a witness not only because of his addiction, but also by reason of his desire to do and say whatever the Federal agents required in order to avoid a long prison term. The evidence that Marchese sold drugs to Sussman arose largely from the conversations testified to by Agent Richards as being overheard through the use of the Schmidt transmitter concealed on Sussman's person (G. B. p. 5; Pet. 10, 20-23) which is assailed as violating Marchese's constitutional rights.

We refer this Court to the *Statement of the Case* in petitioner's (appellees') reply brief before the Circuit Court and to the *Statement of Facts* in this petition (Pet. pp. 9-12) and as well as in Marchese's petition for habeas corpus [C. T. Vol. 2, pp. 6-11] for a detailed statement of the facts herein.

ARGUMENT.

1. The Respondents Contend That the Court of Appeals Was Manifestly Right in Holding That the District Court Exceeded Its Authority in Reducing Petitioner's Sentences.

Before answering this contention, we reiterate that the manifest intention of the District Court was to vacate the judgment of conviction and discharge petitioners for the time served by them, because of the violation of their constitutional rights, and also "to serve the ends of justice." This intended action of the District Court was not only authorized under its discretionary powers granted under habeas corpus proceedings (Title 28, Sec. 2243 U.S.C.) but also under the motion procedure (Title 28, Sec. 2255 U.S.C.) and under the decision of this Court in granting certiorari (*Marchese v. United States,* 374 U.S. 101).

As pointed out in our reply brief before the Court of Appeals (Appellee's Br. 17-19) and in the present petition (pp. 27-32) Judge Thurmond Clarke of the District Court intended to vacate the judgment and discharge petitioners for time served, and the reduction of their sentences to five years was incidental to and to fortify and support his decision against attack on appeal, and it was also done at the request of petitioners' counsel. Through inadvertence the language of Sec. 2255 was not strictly followed, but the last sentence of the judgment in each case may be considered independent of the order of reduction. This is sufficient to comply with the wording of Sec. 2255 and reads as follows:

> "It is adjudged that defendant and petitioner be immediately released from custody" (Pet. App. A(2) and B(2).)

For the sake of argument only, let it be assumed that respondents are correct in their contention that the language of Sec. 2255 does not provide that the District Court may reduce the sentence. We, then, contend it can do so under the construction placed thereon in numerous decisions of this Court that said section is "exactly commensurate" with habeas corpus (*United States v. Hayman*, 342 U.S. 205; *Hill v. United States*, 368 U.S. 424; *Sanders v. United States*, 375 U.S. 1).

The Court stated in *Sanders* on page 15:

> "Indeed, if he were subject to any procedural hurdles which make his remedy under 2255 less swift and imperative than federal habeas corpus, the greatest constitutional doubts would be engendered. We, therefore, hold that the similar relief provision of Sec. 2255 is to be deemed the material equivalent of Sec. 2244. . . . Since the motion procedure is the substantial equivalent of federal habeas corpus, we see no need to differentiate the two for present purposes."

Since the remedy and relief under Sec. 2255 is "exactly commensurate" and the "material equivalent" of habeas corpus, the District Court does have the right, power and discretion, regardless of the apparent language of 2255, to "summarily hear and determine the facts and dispose of the *matter as law and justice require.*" (Title 28, Sec. 2243) *Emphasis added.* There is no restriction placed upon the type of relief which the District Court could grant under Sec. 2243, and hence none also under Sec. 2255.

Again, for the sake of argument only, assume that the District Court could not reduce the sentence and discharge the petitioners under Sec. 2255. It could, nevertheless, grant such relief under Sec. 2243; and since petitioners were both incarcerated in the territorial jurisdiction of the District Court, said sections could be relied upon interchangeably; and if the relief could be granted under either section, the judgment of the District Court as to the relief granted should be upheld, no matter under which section the District Court judge believed he was acting.

Section 2255 expressly provides for the remedy of habeas corpus if it "appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." (App. G. p. 57). Thus if Sec. 2255 is "inadequate or ineffective" resort may be had in this case to habeas corpus.

However, assert respondents, the District Court had no power to reduce sentences beyond 60 days under Rule 35 of the Rules of Criminal Procedure, and that Rule 45(b) specifically forbids enlargement of this period. (Citing: *United States v. Robinson,* 361 U.S. 220, 223-224 (2); and *United States v. Hunter,* 162 F. 2d 644, 647-648); and that said rule is inflexible and jurisdictional. Respondents' contentions might have merit if an attempt should be made to reduce the sentence, where there were no constitutional rights or questions involved, and where no collateral attack is made on the judgment for violation of constitutional rights.

In the *Robinson* case, there was dicta only in support of respondents' contention as to Rule 35.[2] In the

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[2] In note 14 of *Robinson* (p. 230) the Court stated:

> "The allowance of an appeal months or years after expiration of the precribed time seems unnecessary for the accomplishment of substantial justice, for there are a number of collateral reme-

Hunter case, the judgment was concededly a valid one, and the Appellate Court held that the District Court had no authority to correct or modify a sentence under a *valid judgment* beyond a 60-day period. There was in the *Hunter* case no collateral attack upon the judgment as in the instant case.

In the cited case of *Jenkins v. United States,* 325 F. 2d 942, the defendant pled guilty and sought to have his sentence vacated because he was induced by the Court to change his plea to guilty. The Court found this to be untrue, and denied his petition but still reduced his sentence. In this case as in the other cited case of *Richard v. United States,* 217 F. 2d 452, the judgment was not subject to collateral attack and hence the cases cited by respondents are not applicable.

On the other hand where a collateral attack is made on the judgment under habeas corpus or Sec. 2255 it has been held that the Court had jurisdiction to reduce a sentence even though more than 60 days had transpired since the imposition of the sentence, as we pointed out in the petition (Pet. pp. 12, 33-34), *Kinsella v. Looney,* 217 F. 2d 445; *Powell v. Wiman,* 287 F 2d 275; *McKenna v. Ellis,* 280 F. 2d 593).

Respondents have either ignored or glossed over the holding in said cases. We submit that the rules laid

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dies available to redress denial of basic rights. Examples are: The power of a District Court under Rule 35 to correct an illegal sentence at any time and to reduce a sentence within 60 days after the judgment of conviction becomes final; the power of a District Court to entertain a collateral attack upon a judgment of conviction, and to vacate, set aside or correct the sentence under 28 U.S.C. Sec. 2255, and proceedings by way of error *coram nobis*".

The above note indicated that the Supreme Court was of the opinion that Sec. 2255 was available even in absence of an appeal where "basic (constitutional) rights" were involved.

down in said decisions that the District Courts under either or both Sections 2243 and 2255 may reduce sentences, and order petitioners discharged for time served in the interest of justice, should be enunciated by this Court in order to settle this important question and resolve any apparent conflicts in the Appellate Court decisions.

2. Secondly, Respondents Contend That the Court of Appeals Was Also Correct in Holding That the Determination by the District Court That Petitioners' Convictions Were Vulnerable to Collateral Attack Was Without Substantial Support in the Record.

We cited in appellees' reply brief before the Court of Appeals specifically, by pages in the Reporters' Transcripts and Exhibits, the evidence in support of each finding of the District Court [C. T. pp. 139-142, App. Reply Br. pp. 53-54]. There is ample circumstantial evidence as well as reasonable inferences from facts established in support of the findings of the District Court. In cases such as this, it is impossible to prove perjury of the so-called "special employees" and the government agents relating to the existence of an agreement between them by direct evidence. Obviously the "special employee" and the Federal agents will (and did) deny the existence of any agreement that the "special employee" would get a lighter sentence in exchange for favorable (to the Government) testimony." We must, therefore look to their conduct to ascertain the true facts. The activities of Agent Richards after he induced and procured Sussman to "cooperate" with Federal agents clearly shows that some "deal" or agreement had been made.

At the hearing, Richards testified as to his activities to obtain leniency for Sussman, which bore great fruit in that Sussman obtained incredible leniency considering his record.[3] Richards also testified that he did not know prior to the time of trial that Sussman was using narcotics regularly and that he never appeared to be under the influence of narcotics. This was in direct contradiction of his testimony at the trial that he knew Sussman was using narcotics during the investigation between January 30th and March 13, 1958. It was also in contradiction of Sussman's own testimony at the trial that he was using narcotics every 4½ hours in amounts valued at $75.00 per day, and was under the influence of narcotics during the entire investigatory period, and that he took narcotics each time before meeting the Federal officers. It is incredible that a narcotics agent of Richards' experience was not aware that Sussman was under the influence of narcotics whenever he met the officers.

The District Court was thus justified in disbelieving Richards' denials of any promise or agreement, and finding that there was some promise, agreement or assurance of some kind given by him to Sussman that the latter would get consideration and lenient treatment if he cooperated.

In *Napue v. Illinois,* 360 U.S. 264, the state's witness Hamer denied that any promise was made or reward offered for testifying. The fact that some promise was made by the prosecutor came out only by fortuitous circumstances, when the prosecutor, then in private practice, represented the said state witness in seeking a reduction of the latter's sentence. Even in the *Napue* hearing the attorney attempted to modify his language in the petition filed by him for Hamer and the Illinois Court denied Napue relief on the basis of the attorney's testimony. This Court nevertheless reversed the case.

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[3] At the time of the hearing Sussman was not available to be called as a witness since not long after his return to Los Angeles following his release from prison, he died at the U.C.L.A. Medical Center on September 11, 1960, of "acute alcoholism".

In the instant case, Richards' activities and his own testimony at the hearing indicated that he had promised Sussman he would try to obtain leniency for him and that he was successful in so doing even before the trial.

It is obvious also that Richards talked to the Assistant U.S. Attorney Bevan concerning the same, since otherwise, Bevan, knowing of Sussman's past criminal record, would not have caused the charge of violating Sec. 174 of Title 21 U.S.C. (which provides for a possible sentence of 20 years *without probation or parole*), to be dismissed and a tax count (Title 26, Sec. 4704(a) and 7237) providing for a sentence of two to five years (*with possibility of parole*) to be submitted and the minimum sentence of two years to be imposed by Judge Byrne.

Not only did Bevan know of Richards' activities and promises or assurances to Sussman, but also of the extreme leniency which had been given to Sussman by Federal and State Courts, prior to the trial of petitioner; yet he stood by and did nothing to disclose these matters and even interposed an objection to the question as to whether there was any "agreement". It was his duty, when Richards testified falsely that nothing was ever said in his presence that Sussman would receive a lighter sentence if he cooperated, to disclose this fact, to the jury. Bevan knew from his experience as a prosecutor that as a matter of course, through his recommendation and the recommendation of Richards, that Sussman would receive a much lighter sentence than otherwise. Bevan also knew that he had already provided the means of a lighter sentence in the substitution of the charges against Sussman. Yet he did nothing to bring this to the attention of the jury and hence violated the strict requirements of *Berger v. United States,* 295 U.S. 78, page 88.

There was thus ample evidence to support the findings of the Trial Court as to the existence of some promise, arrangement or assurance. The Court of Appeals in holding otherwise went directly contrary to rules with respect to appellate procedure pertaining to the upholding of findings of the Trial Court. We have pointed out how the Appellate Court disregarded these rules, some of which had previously even been enunciated by the Ninth Circuit Court itself in the petition for rehearing (Appendix E, pp. 51-53), and we respectfully call this Court's attention to the same.

3. Third, Respondents Contend That There Is No Merit to Petitioner's Claim That the Court of Appeals' Decision Is Inconsistent With This Court's Remand in Marchese v. United States, 374 U.S. 101, or With the Decision in Sanders v. United States, 373 U.S. 1.

We disagree with this contention. This Court had before it in the previous proceeding, wherein it granted certiorari, the same grounds for the granting of the writ of habeas corpus and the same issues raised by the Government in its opposition, except as to the relief granted by the District Court on remand. In that proceeding the Court of Appeals upheld the dismissal of Marchese's petition for habeas corpus by Judge Hall without a hearing. (Judge Pierson Hall was not the trial judge, but dismissed the petition *ex parte* in the absence of Judge Thurmond Clarke, the trial judge). This Court then reversed the Court of Appeals and remanded the case to District Court where it came for hearing before Judge Clarke, the proper judge to hear the matter.

One of the issues raesed in said petition for certiorari and in the instant petition, was whether petitioner's constitutional rights were violated by the use of the electronic Schmidt transmitter concealed on Sussman's person by the officers and the admission of testimony of the officers, over objection by petitioners, as to what they overheard. This was a clear violation of the right of privacy under the Fourth Amendment of the Constitution and of due process under the Fifth Amendment.

When petitioners first appealed from the judgments of conviction, the Appellate Court affirmed the judgment without opinion and hence did not pass upon, at least by any opinion, the said issue. This Court then denied certiorari without opinion, but this did not mean approval of the decision of the Court of Appeals.

It has been repeatedly held by this Court that denial of certiorari with no statement of reasons, should be given no weight in passing upon the same petitioner's application for a writ of habeas corpus and such denial imparts no expression of opinion on the merits. *Sunal v. Large, supra,* p. 181, *Brown v. Allen,* 344 U.S. 443, 492, 497. Further, denial of an application for writ of habeas corpus is not *res adjudicata. Sanders v. United States, supra, Fay v. Noia,* 372 U.S. 391.

When the petition of Marchese for habeas corpus was dismissed, the judgment of dismissal was affirmed by the Court of Appeals, not on the merits of the issue but on the grounds that the issues had been or should have been raised and passed upon by the appeal, and that habeas corpus could not serve as an appeal. The Solicitor General in opposing the petition for certiorari also made the same argument relying on the case of *Sanders v. United States,* 297 F. 2d 735, then pending on certiorari. This Court disposed of such issue by reversing the *Sanders* case and reversing the Court of Appeals in the Marchese case. These decisions are in accord with other decisions of this Court, namely: *Price v. Johnson,* 334 U.S. 266; *Sunal v. Large, supra; Waley v. Johnson,* 316 U.S. 1; *Heflin v. U.S.,* 358 U.S. 415.

In the *Sunal* case, this Court in declaring that habeas corpus cannot be used as a substitute for appeal set forth the exception, "where the error does not trench on any constitutional rights of defendants" (p. 182). In that case Mr. Justice Frankfurter notes many exceptions to the rule contended for by respondents. Thus the Appellate Court cases cited by respondents (G. B. pp. 23-24) being contrary to the decisions of this Court cited above, carry no weight in the instant case, but this Court should clarify this apparent conflict by granting certiorari.

Respondents have glossed over and ignored the violation through the use of the electronic transmitter of petitioner's constitutional rights. This violation alone supported a specific finding of the Trial Court upon which Conclusion II was based. As quoted in the decision of the Appellate Court (See App. D. p. 28) the Trial Court also concluded that the constitutional rights of Petitioners had been violated under the Fourth and Fifth Amendments. We have discussed this matter (Pet. pp. 20-23) and the failure of the respondents to dispute our contentions, relying only on the technical defense that such matters have been litigated before, indicates that they also believe there was in fact such a violation by the use of the electronic device. Such violation alone was sufficient to support the conclusion of the Trial Court, "That the constitutional rights of petitioners to a fair trial were denied and so infringed upon as to render the judgment subject to collateral attack." (See App. D. p. 28). Even if all the findings of the Trial Court other than that respecting the use of the Schmidt transmitter, were unsupported, the single finding as to the transmitter was sufficient to support the conclusions and judgment based thereon.

However, we submit that there is ample evidence to support other findings as to infringement of petitioners' constitutional rights. In addition to evidence of, (1) the charges of perjury on the part of Sussman and Agent Richards, (2) the suppression by the United States attorney of relevant evidence, or at least his failure to disclose relevant facts with respect to Agent Richards and Sussman as enjoined in the case of *Berger v. United States, supra,* and (3) the arrest of petitioners and search of Marchese's apartment and Del Bono's auto without a search warrant, the Trial Court had before it evidence that the Government agents consented to, acquiesced in and condoned the commission by Sussman of crimes during the investigation, in that they permitted Sussman to have possession of and use heroin in support of his narcotic addiction. During such period Sussman by his own testimony used narcotics valued at $75.00 a day aggregating during the investigation in excess of $3,000.00. This was certainly what has judicially been termed "dirty business" on the part of the agents.

In *Sherman v. United States,* 356 U.S. 369, at 380, Mr. Justice Douglas quoted from the dissenting opinion of Mr. Justice Holmes in *Olmstead v. United States,* 277 U.S. 438 as follows:

> "It is also desirable that the Government should not itself foster and pay for other crimes when they are the means by which evidence is obtained."

The trial court could and did consider all of such matters in granting the petitions of Marchese and Del Bono. It was not incumbent upon the court as complained by respondents, to state which particular grounds it considered Marchese's conviction to be vulnerable to collateral attack, since it could consider all of such grounds, and if one ground clearly existed, it was enough to support the granting of the petitions and the discharge of petitioners.

As stated in *Bishop v. United States,* 223 F. 2d 582 at 587:

> "A trial judge is not supposed to recite the evidence upon which he bases a finding, and the validity of his finding does not depend on what an appellate court thinks he has in mind at the moment; he is presumed to have the whole record in mind."

Furthermore, the rule has been often stated that all intendments are in favor of upholding the judgment of the trial court and it is presumptively correct on all issues. *Wick v. Keshner*, 244 F. 2d 146. (See also Pet. App. E, pp. 51-53).

In the instant case, the trial court exercised its judicial discretion and there is no claim by respondents that it abused its discretion. This Court stated in *Fay v. Nola, supra,* (p. 438).

> "Discretion is implicit in the statutory command that the judge after granting the writ and holding a hearing of appropriate scope 'dispose of the matter as law and justice require', 28 U.S.C. Sec. 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles."

4. This Court Should Grant Certiorari Herein to Settle Important Questions of Law and Resolve Conflicts in the Decisions of the Appellate Court.

We have discussed this point in the petition for certiorari under the headings of "Questions Presented" (7-8) and "Reasons for Granting the Writ" (12-13) as well as in our Argument (14-35), so we shall only briefly discuss it.

The very fact that the respondents make contentions contrary to the cases cited by petitioners and cite cases upon which they base their contentions, shows that there is a conflict, or at least an apparent conflict, in appellate court decisions which must be resolved.

The circuit court disagreed with the interpretation and effect of this Court's decision (*Marchese v. United*

States, 374 U.S. 101) (Pet. pp. 7, 12) and with the contentions of both petitioners and respondents as to the meaning and application of the Sanders decision (App. D, pp. 7-12); and this disagreement should be resolved and determined by this Court.

The question as to the extent of the relief the district courts may grant including reduction of sentence either under habeas corpus (Sec. 2243) or the motion procedure (Sec. 2255) or both together has never been determined by this Court and it should do so for the guidance of federal courts in the future.

While the cases of *Lopez v. United States,* 373 U.S. 427, and *Silverman v. United States,* 365 U.S. 505 impliedly overruled the case of *OnLee v. United States,* with respect to testimony obtained through the use of an electronic transmitter, this Court has rendered no positive decision whether or not such use is violative of the Fourth and Fifth Amendments of the Constitution. In *Massiah v. United States,* 374 U.S. 805, the Court stated that, since the case was reversed for violation of the rights under the Sixth Amendment, it was not passing upon rights allegedly violated through the use of the electronic transmitter. It thus seems necessary that this Court definitely resolve and settle this important question by granting certiorari, and rule definitely, as implied in the *Lopez* case, that such use was in violation of the Fourth and Fifth Amendments.

This Court should also determine and settle the extent of the judicial discretion exercisable by the district courts under Section 2255 as compared with habeas corpus.

And finally, this Court should determine whether perjury and the knowing use by the prosecution of perjurious testimony of government witnesses, can be established and proved by circumstantial evidence and inferences drawn by the trial court from established facts in order to come within the rule of *Napue v. United States,* 360 U.S. 264.

Conclusion.

In conclusion we respectfully submit (1) that in the instant case there was a violation of petitioner's constitutional rights in several particulars; (2) that even if there was a violation in only one particular, and the finding as to one was supported by the evidence, the judgment of conviction of petitioners was subject and vulnerable to collateral attack; (3) that, therefore, the trial court could grant such relief as would be fair and equitable as "law and justice might require"; (4) that the trial court in the granting of relief could treat the proceedings interchangeably as a motion under Section 2255 or as a petition for habeas corpus under Section 2243 of Title 28 U.S.C., and if the granting of relief can be supported under either section, the judgment must be upheld; (5) that the primary intent of the trial court was to vacate the judgment and discharge the petitioners for the time served, and the reduction of their sentences was incidental and in support of such intent and to fortify its judgment of discharge; (6) that by reason of the infringement of petitioners; constitutional rights, whether in one or several particulars, and by reason of their excellent prison records it was fair and equitable and serving the ends of justice to discharge them for the time served (approximately 4½ years in each case); and (7) that the said judgment of the trial court in the exercise of its discretion as authorized by both habeas corpus under

Sec. 2243 and the motion under 2255, and by this Court's decision granting certiorari in Marchese and remanding the case to the district court for reconsideration, should be upheld and the decision of the court of appeals reversed.

We further respectfully submit that, if this court should determine that the reduction of the sentences of petitioners to be beyond the jurisdiction of district court, it should remand the case to the district court with instructions to modify its judgment by elimination the portion pertaining to reduction and to order the vacation of the judgment of conviction and discharge petitioners for the time served as intended.

Respectfully submitted,

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